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INTRODUCTION:
REGULATION, ADJUDICATION AND DISPUTE RESOLUTION BEYOND THE STATE

Sabino Cassese

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PART 1 - THE GLOBAL ADMINISTRATIVE PROCESS

1. Global Actors and their Networks

I shall start with some statistical data. There are 191 Member States of the United Nations. There are approximately 2000 international organizations. There are around 15-20,000 international non-governmental organizations (NGOs)[1].

There are the following international organizations in the environmental area alone: the International Whaling Commission, the UN Framework Convention on Climate Change Secretariat, the UNEP Ozone Secretariat, the Secretariat of the Convention on Biodiversity, the Secretariat of the Convention on International Trade in Endangered Species, the Basel Convention Secretariat, the UN Secretariat of the Convention to Combat Desertification, the FAO/UNEP Secretariat on the Rotterdam Convention on Prior Informed Consent, the UNEP Convention on Migratory Species Secretariat, the International Tropical Timber Organization.

The global legal order is frequently described as a multilevel system of governance. This common view posits the first level as the State level, and the second as the global level. However, the reality is more complex.

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[1] See *Yearbook of International Organizations 2003-2004*, Muenchen, Saur, 2003. According to the United Nations, there are 44,000 NGOs: *Building Partnerships. Cooperation between the United Nations System and the private sector*, New York, United Nations Public Information, 2002.

Firstly, from a formal point of view, all members of the international community are legal equals. «*A small republic is no less a sovereign State than the most powerful kingdom*»[2]. But

a. «*the world's economic fragmentation arises from its political divisions. Lack of "jurisdictional integration" sustains bad government: in effect, there are too many countries*»[3];

b. «*more than half the world's countries have fewer people than the State of Massachusetts, which has about 6 million*»[4];

c. «*of the 10 richest countries in the world in terms of GDP per head, 6 have fewer than 1 million people*»[5];

d. Saint Vincent and the Grenadines– a State that we will encounter shortly as a party in a case decided by the International Tribunal of the Law of the Sea – had an estimated population of 115,000 in 2002 and is a member of the United Nations;

e. in addition to fragmentation and difference in size, there are also important differences in power and influence.

It follows that States are not in fact equally sovereign.

Secondly, global actors include not only States, but national agencies as well. Most global regulations derive from the interaction between domestic agencies and global regimes. From the global perspective, we are witnessing a disaggregation of the State, in which the paradigm of «the State-as-a-unit» is losing its validity.

Thirdly, members of international organizations include not only States, but also non-national institutions, like the European Union (as in the case of the International Olive Oil Council and the World Trade Organization) and other regional organizations, as well as private, non-governmental bodies, like in the case of the Internet Corporation for Assigned Names and Numbers – ICANN. We can also mention the numerous «observers» that participate in the activities of international organizations. It is, therefore, better to avoid the common denomination of such organizations as «intergovernmental».

Fourthly, «[f]*ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine* [….]»[6].

Fifthly, recent initiatives are «*designed to include civil society – defined as all interest and identity associations outside the state – in the governance activity of international organizations*»; «[….] *when the [World]Bank issues a loan for a specific development project such as a dam, it requires that the recipient government consult with the local residents and NGOs to design relocation plans and environmental preservation measures*»[7].

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[2] E. DE VATTEL (1758), quoted in A. CASSESE, *International Law*, Oxford, Oxford University Press, II ed., 2005, p. 52.

[3] M. WOLF, *Why Globalisation Works*, New Haven and London, Yale University Press, 2004 (see *The Economist*, July 17, 2004).

[4] A. ALESINA and E. SPOLAORE, *The Size of Nations*, Cambridge MA, MIT Press, 2003 (see *The Economist,* December 20, 2003).

[5] *Ibidem*.

[6] B. KINGSBURY, N. KRISCH, R. STEWART, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf*, p. 8 (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 15 ff.). These authors are still puzzled by mutual recognition and cooperative standards: are they distributed administrative regulation, or (bilateral) network regulation, or a «sui generis» category?

[7] F. BIGNAMI, *Civil Society and International Organizations: A Liberal Framework for Global Governance,* available at *http://www.law.virginia.edu/home2002/pdf/workshops/0506/bignami.pdf*, p. 3.

Sixthly, «[….] *NGO involvement in all processes of IGO activities, ranging from monitoring treaty obligations, treaty-generation processes, and treaty implementation processes at the national level, has been crucial and indispensable.* [….] *they have creatively fed their knowledge and expertise into the decision-making processes at all levels*»[8].

Seventhly, while it is extremely pervasive, the global legal order is not entirely universal. Individual States are not members of all international organizations. Some global institutions have, in fact, a regional area of influence.

One can therefore observe that:

a. international organizations do not rely only on States: they have established a direct dialogue with civil society;

b. States are more powerful than is usually imagined, as they play a double role in the global legal order: they act according to the State-as-unit paradigm, *and* they also act through their own agencies, according to the fragmented-State paradigm;

c. States are also less powerful than we commonly think, in that they share their role inside the global institutions with non-governmental organizations;

d. the statement that States enjoy sovereign equality is a legal principle that does not correspond with reality;

e. national and global governance cannot be presented as a two-level system of governance, as civil society organizations, domestic agencies and supranational organizations all play a role as global actors;

f. global regulators – who cannot be regarded as mere agents of the States or national agencies - penetrate domestic agencies, that thus lose their independence.

International and regional organizations, States and non-State actors are mutually involved and follow the logic of collective action. This «[….] *is becoming a heterogeneous, multilayered logic, derived not from one particular core structure, such as the State, but from the structural complexity embedded in the global arena. Globalization does not mean that the international system is any less structurally anarchic; it merely changes the structural composition of that anarchy from one made up of relations between functionally differentiated spheres of economic activity, on the one hand, and the institutional structures proliferating in an ad hoc fashion to fill the power void, on the other*»[9]

2. The Global Machine: how does it work?

There is no higher authority in the global legal order. Therefore, there is not the kind of hierarchy that characterizes domestic governments. Nor there is uniformity, as some global regimes are more developed than others, some less so. Given these conditions, how can the Global Machine work? And what are the principles and rules on which it is based?

The first rule of the Global Machine is *transactionalism*[10]. Take as an example Article 16.1 of the «Convention for the conservation of Southern Bluefin Tuna» (20 May 1994): «[i]*f any dispute arises between one or more of the Parties concerning the interpretation or the implementation of*

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[8] E. RIEDEL, *The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors*, in *Developments of International Law in Treaty Making*, edited by R. Wolfrum and V. Röben, Berlin, Springer, 2005, p. 317; see also the comment of S. Hobe to Riedel article, *ibidem*, p. 328. For a variety of reasons, some authors, like R. Stewart, prefer to include pervasive differences in collective action issues and accountability mechanisms, to make a consistent and strong distinction between economic actors and «social» NGOs.

[9] P.G. CERNY, *Globalization and the Changing Logic of Collective Action,* in *International Organization*, 49, 1995, no. 4, p. 620.

[10] J.H.H. WEILER, *The Geology of International Law – Governance, Democracy and Legitimacy*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64, 2004, pp. 547 ff.

this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice».

Notice the importance of governance by contract: a convention provides for subsequent contractual means of conflict resolution.

All six ways of solving disputes are worth studying, but the handling of international disputes by means of inquiry is especially interesting, as shown by the «Red Crusader» case between Denmark and the United Kingdom (1962). In this case, «[*t*]*wo traditionally friendly countries, members of the same military alliance, searching for a speedy way to settle their dispute* [….], *found that the setting up of a commission of inquiry would be the most suitable method of meeting the exigencies of the situation. The commission lived up to their expectations by providing them with the basis for a satisfactory settlement*»[11].

The second rule of the Global Machine is a mixture of *consensus, unanimity and different kinds of majoritarian principles*. For instance, all intergovernmental bodies of UNCTAD take decisions by consensus. Article 11 of the International Agreement on Olive Oil Table Olives (1986) prescribes consensus for the International Olive Oil Council. Article 15 of the Rules of Procedure of the Committee for Environmental Protection (Antarctic) provides that «*where decisions are necessary, decisions on matters of substance shall be taken by consensus of the members of the Committee participating in the meeting*». If decisions regard procedural matters, a simple majority is enough. If the Committee has to decide whether a question is substantive or procedural, such decision must be taken by consensus.

For some global institutions' bodies unanimity is required. For instance, the Rules of Procedure of the Commission for the Conservation of the Southern Bluefin Tuna (21 April 2001), Article 6.1, provide that «[…] Decisions of the Commission shall be taken by a unanimous vote of the Members present at the Commission meeting».

Consensus is a rigid rule that produces inertia, as in the historical case of the Polish Diet. But global institutions regulations also provide means for softening or escaping such rigidity. In the first case, what is usually required is just a consensus of the members participating at the meeting, not of all members. Let us also consider the following three clauses. The Rules of Procedure (1997) of the Executive Committee of the High Commissioner's Programme of UNHCR, Article 26, provides that «[….] *the Chairman will, in the ordinary course of business, ascertain the sense of the meeting in lieu of a formal vote. If the Committee proceeds to a vote, each representative shall have one vote. Decisions of the Committee shall be made by a majority of the members present and voting* […]». The Rules of Procedure of the Codex Alimentarius Commission, Article X.2, provide that «*The Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting only if such efforts to reach consensus have failed*». The International Plant Protection Convention (1997), for the Commission on Phytosanitary Measures, Article XI.5, provides the following: «*the contracting parties shall make every effort to reach agreement on all matters by consensus. If all efforts to reach consensus have been exhausted and no agreement is reached, the decision shall, as a last resort, be taken by a two-third majority of the contracting parties present and voting*».

Consensus can also be used for a different purpose, as in the case of reverse consensus. For example, the WTO Dispute Settlement Body has to reach consensus in order to reject a WTO Appellate Body Report.

Finally, consensus is not an absolute rule. The General Rules of the Office International des Epizooties, Article 6, require that decisions be taken by a simple or absolute majority (only

[11] N. BAR-YAACOV, *The Handling of International Disputes by Means of Inquiry*, London, Oxford University Press, 1974, p. 195; see also *International Law Reports,* edited by H. Lauterpacht, vol. 35, London, Butterworths, 1967, p. 485

modifications of the Agreement establishing the Office and of its Organic Statutes require «common consent»). A majority of the members present is required for decisions in the International Association of Insurance Supervisors (IAIS), Article 31, and for decisions not regarding the adoption or amendment of standards at the Codex Alimentarius Commission (Rules of Procedure, Article VI.2), while a two-thirds majority is required by Article 15 of the Constitution of the International Civil Defence Organization (1966). The Montreal Protocol on Substances that Deplete the Ozone Layer states that a two-thirds majority may adopt «adjustments» to the agreement's reduction schedule, which are then binding on all parties to the original instrument. Some bodies take decisions by reverse consensus, meaning that decisions are adopted unless there is a consensus against them.

The third rule of the Global Machine is *organized anarchy*. As the system is not planned, conflicts and reactions are governed by rules. The result is a mixture of market forces and planning. Two good examples are the anti-dumping duties and the retaliatory measures in the WTO system. As for the first, it is provided that «*in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such products*». As for the second, Article 22 of the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU) provides that, in the event that the recommendations and rulings of the Dispute Settlement Body (DSB) are not implemented within a reasonable period of time, decisions regarding compensation and suspension of concessions or other obligations can be adopted. Notice that in the first case a national government reacts to a foreign company's decision, while in the second case a national government reacts to a foreign government's decision.

The fourth rule of the Global Machine is *transnationalism*. While the usual picture of global governance focuses on vertical links – global versus national – the reality of global governance is made up of many horizontal relations – among international agencies and between national governments and agencies. This transgovernmental cooperation produces administration by agreements made beyond the State.

As for the first, «*Inter-agency co-operation in international economic law is a central element of global economic governance*»[12].

As for the second, government networks «[*a*]*t the most general level* [….] *offer a new vision of global governance: horizontal rather than vertical, decentralized rather than centralized, and composed of national government officials rather than a supranational bureaucracy*»[13].

A good example of horizontal links are mutual recognition agreements. The Agreement on mutual recognition between the United States of America and the European Community (1997), Article 2, provides that «[….] *each Party will accept or recognize results of conformity assessment procedures, produced by the other Party's conformity assessment bodies or authorities, in assessing conformity to the importing Party's requirements* [….]». Mutual recognition «*consists in intermingling domestic laws in order to 'constitute' the global*»[14].

It is important to point out the causes and effects of transnationalism. As for the causes, the more that national markets open up to each other, the more that asymmetries become evident. To reduce these asymmetries and level the playing field, global rules can establish general principles, but cannot go into all the details. Therefore, mutual agreements play an important role.

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[12] C. TIETJE, *Global Governance and Inter-Agency Co-operation in International Economic Law,* in *Journal of World Trade,* 36, 2002, no. 3, p. 515.

[13] A.-M. SLAUGHTER, *Governing the Global Economy through Government Networks*, in *The Role of Law in International Politics*, edited by M. Byers, Oxford, Oxford University Press, 2000, p. 193.

[14] K. NICOLAIDIS and G. SHAFFER, *Managed Mutual Recognition Regimes: Governance without Global Government,* IILJ Working Paper 2005/6 (Global Administrative Law Series), available at *http://www.iilj.org/publications/documents/2005.6NicolaidisShaffer.pdf*, p. 8 (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 263 ff.).

The reliance of the global legal order on horizontal links and networks produces three effects. It reduces the «verticality» of the global machine, because the *superioritas* of the higher authorities rests on an intricate web of horizontal and contractual relations[15]. It facilitates the political transfer or transplant of institutions from one national legal order to another[16]. It stimulates the research of functional analogies hidden by formal differences in national systems[17].

Finally, the transnational component of the legal globalization suggests caution in stressing the withering away of the State or the flight of power beyond the State, as the dynamic of global administrative law is largely dependent on the State or State fragments[18].

The fifth rule of the Global Machine is *shared powers*. One example may be found in the Patent Cooperation Treaty (19 June 1970), that establishes a regime of cooperation between national and global authorities. Article 3.1 provides that «[a]*pplications for the protection of inventions in any of the Contracting States may be filed as international applications under this Treaty*». Article 31.1. provides that «[o]*n the demand of the applicant, his international application shall be subject of an international preliminary examination* [….]». According to Article 36.3, «[t]*he international preliminary report* [….] *shall be communicated by the International Bureau to each elected Office*» (the elected Office is the national Office). According to these articles, proceedings are half global, half domestic. The two levels of government share their powers.

The sixth rule of the Global Machine is *hybrid regulatory and administrative governance*. «*Standardisation is being privatised throughout the developed world to facilitate the harmonisation of technical specifications*». At the same time, «[*n*]*ational standards bodies themselves* [….] *are rapidly losing power in the emerging system of private "supranationalism"*». The result is «*the emergence of a relatively autonomous system of law making beyond the State*», the «*Constitution of private governance*». In this Constitution, «*the public/private distinction ceases to make sense*»[19].

What helps the Global Machine to work, given such a confused picture, is the lack of a fixed role for global actors. This lack emphasizes their power-maximizing role because it puts incentives on their action as power-seekers.

To sum up, the domestic arena is dominated by hierarchies and established roles, a monopoly of the relations with civil society internally, and contractual relations with other States, xternally. The global arena, on the contrary, is dominated by networks, fluid roles and mobile alliances. In the global arena, the winners are those who establish direct links with civil society, thus breaking the monopoly of the States.

The loosely-structured Global Machine produces much fluctuation, but also manifests a speedy evolutionary process; most of the developments that I am speaking about occurred in the last 15-20 years.

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[15] On the metaphor of «verticality», see P. COSTA, *Immagini della sovranità fra medioevo ed età moderna: la metafora della «verticalità»*, in *Scienza e Politica*, 2004, no. 31, p. 9.

[16] On the import and export of institutions, P. POMBENI, *I modelli politici e la loro «importazione» nella formazione dei sistemi politici europei*, in *Scienza e Politica*, 2004, no. 31, p. 69. Transplants, in turn, favour contagions, as legal principles and institutions, once introduced in a particular sector, spread via analogy and judicial application, thus becoming more general.

[17] This was the purpose of the «Cornell Common Core Project», launched and carried out in the early sixties by Rudolf Schlesinger.

[18] This point is stressed by S. Battini in a seminar paper on *Quattro percorsi della globalizzazione della pubblica amministrazione e del diritto amministrativo*, presented to a conference held at the Scuola Superiore della Pubblica Amministrazione, in Rome, on December 6, 2005.

[19] H. SCHEPEL, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford, Hart, 2005, pp. 405 and 414.

3. The Globalization of Regulation

Almost any human activity is subject to some global regulation. Global regulatory regimes go from forest preservation to the control of fishing, water regulation, environmental protection, arms control, standardization and food safety, financial and accounting standards, Internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, and more.

Among these regulatory regimes there are great differences. Some provide just a framework for State action, others establish guidelines in order to guide domestic agencies, others affect national civil society. Some regulatory regimes create their own implementation agencies, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, others resort to negotiation.

Taken together, these regulatory regimes present five main problems. Firstly, there is significant overlapping between them. Secondly, they have a strong impact on domestic regulatory powers. Thirdly, they establish standards for private parties, by-passing national regulatory authorities. Fourthly, they are binding. Lastly, they have serious enforcement problems.

The first problem is that of interconnection (*regime complex*). As observed by the Arbitral Tribunal (Annex VII UNCLOS), «*there is frequently a parallelism of treaties*» and «*the current range of international legal obligations benefit from a process of accretion and cumulation*»[20]. This interconnection has been called «regime complex»: «[….] *an increasingly common phenomenon is the "regime complex": a collective of partially overlapping and non hierarchical regimes*»[21] .

«[….][*T*]*he Codex Alimentarius Commission (CAC) has changed after the World Trade Organization (WTO) referred to it as the reference point for the elaboration of international food standards*». Before 1995, «*it was entirely voluntary for member states to base their national regulations on Codex standards*». After 1995, a State wishing to go beyond the global food standards must demonstrate the scientific basis of its measure and how it complies with the level of protection established by the Codex Alimentarius Commission[22]. The two global regulatory regimes thus reinforce each other.

The decoupling of standard-setting and standard-enforcement creates new problems of accountability: «*If third parties enforce standards, it will be especially difficult for the standard users to hold the standard setters accountable for the consequences of those standards*». «[D]*ecoupling rule making and enforcement is the key to the accountability deficit of standards*»[23].

The principle that WTO rules are not to be interpreted in isolation from other rules of general public international law was established by the first WTO Appellate Body decision[24]. It follows from this that the different regulatory regimes are not self-contained, because they do not exist in isolation from other rules of global law. Therefore, for example, trade rules must be interpreted in

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[20] Arbitral Tribunal (Annex VII UNCLOS), SBT Case, n. 52, 14 August 2000, available at *http://www.itlos.org/case_documents/2004/document_en_249.pdf*.

[21] K. RAUSTIALA and D. G. VICTOR, *The Regime Complex of Plant Genetic Resources*, in *International Organization,* 58, 2004, no. 1, p. 277, on the «connecting regimes», see also the very important contribution by S. BATTINI, *Amministrazioni senza Stato – Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, pp. 232 ff.

[22] F. VEGGELAND and S. OLE BORGEN, *Negotiating International Food Standards: The World Trade Organization's Impact on the Codex Alimentarius Commission*, in *Governance,* 18, 2005, no. 4, pp. 683 and 701.

[23] D. KERWER, *Rules that Many Use: Standards and Global Regulation*, in *Governance,* 18, 2005, no. 4, pp. 623 and 624.

[24] WTO Appellate Body, US Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996, available at *http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/2ABR.wpf*, p. 17.

connection with environmental protection rules.

Secondly, global regulatory regimes have a strong *impact on domestic regulation*. Global law takes functions out of the domestic field and asserts control over domestic agencies. For example many WTO agreements impose obligations on national authorities to ensure transparency, to provide harmonization, to guarantee equivalence, to introduce consultation and control procedures[25]. Another example is that of International Monetary Fund and World Bank standards, like the IMF-WB International Standards: Strengthening Surveillance, Domestic Institutions and International Markets (2 March 2003).

As global regulation emerges out of heterogeneous and fragmented regimes, the interaction between the conflicting global regimes and the great variety of domestic regulations raises one big problem: how can such a fragmented legal order command the compliance of domestic governments? The answer to this question lies in the new opportunities that global regulation provides to national regulatory agencies, while also imposing new obligations on them. There is also another side to the coin: national legal and administrative cultures use global regulation in an attempt to capture new fields. For instance, American adversarial legalism – in particular, the requirement to consult before taking decisions, notice and comment procedures, the right to a hearing, - is conquering the world through global regulation.

Thirdly, global regulation has *direct effect*, inasmuch as it directly affects parties being regulated at the national or local level. An example is provided by the quota system for tuna fishing and the control of importation. The Convention for the Conservation of Southern Bluefin Tuna (20 May 1994), Article 8.3, provides that «[f]*or the conservation, management and optimum utilization of SBT: a) the Commission shall decide upon a total allowable catch and its allocation among the Parties* [….]»; and Article 8.7 continues by providing that «[*a*]*ll measures decided upon under para.3 above shall be binding on the Parties*» (those are Australia, Japan, New Zealand, Korea, Taiwan). Article 1.1 and 1.4 of the SBT Statistical Document Program (approved by the Commission in October 2003) states that «[*f*]*or the importation into the territory of a Member, all southern bluefin tuna shall be accompanied by a CCSBT – SBT Statistical Document* [….]». «*The Commission requests the appropriate authorities of exporting/fishing entities to make the requirements under this Program known to their exporters*». As a consequence, domestic fishing entities are directly affected by the Commission's decisions[26].

Recently, a WTO report has listed 49 global standard setting bodies, not including the global financial standard setting agencies. These bodies adopt standards that are implemented directly by national firms, like banks. Those standards penetrate into the national regulatory context and, while not legally binding, are obeyed in practice at the national level[27].

Fourthly, *global regulatory decisions are binding*. Even when they are not formally binding, compliance is nevertheless monitored. And even when they are not binding and compliance is not monitored, such decisions are often obeyed («*Even if it is non binding, what does it matter, if it is obeyed?*»[28]).

Fifthly, global regulation is directly enforced by supranational regulators. Again, the SBT provides a good example of the *direct enforcement of global regulation*. The Action Plan of the CCSBT (21 – 23 March 2000) has established the following rules: Article 1: «[t]*he Commission*

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[25] S. CASSESE, *Global Standards For National Administrative Procedure*, IILJ Working Paper 2004/4 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/2004.4%20Cassese.pdf*, p. 7 (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 109 ff.).

[26] On the direct effect of global decisions, S. BATTINI, *Amministrazioni*, cit., pp. 246 ff.

[27] S. BATTINI, *Quattro percorsi* cit. See D. KERWER, *Rules that Many Use: Standards and Global Regulation,* cit., p. 618, on the many ways of enforcement of global financial standards.

[28] D. ZARING, *Informal Procedure, Hard and Soft, in International Administration*, IILJ Working Paper 2004/6 (Global Administrative Law Series), availale at *http://www.iilj.org/papers/2004/2004.6%20Zaring.pdf*, p. 38.

requests non-Members catching SBT to cooperate fully with the Commission in implementing the measures applicable to Members for conservation, management and optimum utilization of SBT [….]». Article 3: «[t]*he Chair of the Commission shall request those non-Members identified pursuant to para.2 to rectify their fishing activities so as not to diminish the effectiveness of the conservation and management measures* [….]». Article 5: «[t]*he Commission will review* [….] *actions taken by those non-Members to which requests have been made pursuant to para. 3 and para. 4 and identify those non-Members which have not rectified their fishing activities*». Article 6: «[t]*he Commission may decide to impose trade-restrictive measures consistent with Members' international obligations on SBT products, in any form, from the non-Members identified pursuant para. 5*». We thus see how non-members of the Convention may be affected by the decisions taken by the Commission.

Many questions remain open. A particularly important one is whether global organizations enjoy the same enforcement and sanctioning powers as domestic administrative agencies.

4. Legal Principles for Global Procedures

One of the most astonishing features of the global legal order is the speed with which it has developed principles in order to discipline global administrative proceedings by the rule of law. Principles like the right to a hearing, the duty to provide a reasoned decision and the duty to disclose all relevant information have developed and been enforced in the global arena in the course of just a few years, while their development in domestic legal orders has taken decades or centuries, depending on the State.

The development of these procedural principles in the global arena has a twofold impact: they apply to global decision-making processes and they may also affect domestic proceedings.

Basic principles for the global procedures have been established by treaties, statutory instruments, secondary legislation and global courts.

The International Tribunal of the Law of the Sea, in the Juno trader case (n. 13, 18 December 2004) has established, at para.77, that «[t]*he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision*». Notice that respect for fairness and the due process of law is established by the court as an obligation of the domestic authorities of Guinea-Bissau. These authorities had not only detained the crew, but also failed to inform the ship owner that the bond paid was unreasonable.

Article 34 of the Patent Cooperation Treaty establishes the rights of the applicant to communicate orally and in writing with the International Preliminary Examining Authority, amend the claims, receive a written opinion from the Authority and respond to the written opinion. In this case, procedural rules are imposed on global agencies.

Article 6.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) provides that «[t]*hrough the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered*». Article 6.4 of the same Agreement provides that «[t]*he authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases* [….]». In this case, the duty to provide interested parties an opportunity to obtain the relevant information and be heard is imposed on domestic agencies in order to favour reactions from foreign enterprises which have dumped their products.

Article 3.1 of the GATT Safeguard Measures and Article XIX of the GATT establish the duty

to provide a reasoned and adequate decision, with explanations, to importers, exporters and other interested parties (among them, foreign governments). In this case, global law imposes procedural rules on domestic agencies, and grants not only private parties, but also foreign governments the right to an explanation.

Article 7 of the Sanitary and Phytosanitary Agreement provides that «[m]*embers shall notify changes in their sanitary and phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B*». Para. 1 of this Annex provide that «[m]*embers shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested members to become acquainted with them*»[29]. The transparency principle is, in this case, imposed on individual national authorities mainly to benefit national authorities in other States.

Global rules grant participation to private parties vis-à-vis domestic authorities (thus strengthening the participatory rights already granted in many national legal orders), to national governments vis-à-vis global agencies or other national governments, to global institutions vis-à-vis other global institutions, to private parties appearing before global institutions. Participation is therefore ensured vertically: to private parties before national governments and global agencies; and to national governments before global organizations. And it is in place horizontally as well, guaranteed to: national governments before other national governments; and global institutions before other global institutions. Thus participatory rights created at the global level establish links among the different levels of government and between them and civil society[30].

Those and other similar provisions raise many interesting questions: how is the administrative procedure changed by putting domestic agencies and private parties on the same plane? Do hearings in the global arena play the same role as administrative hearings do in national law? How does the «interest representation model» apply to the global legal order? Do particular structures and procedures fulfil the same function in the global environment as they do in a national one?

To sum up, the global due process of law, compared to the domestic one, is richer, but less effective. It is richer in terms of openness, participation and consultation; is less effective, because transparency, the requirement of reasoned decisions and judicial review are not always granted, and therefore the entire body of the rule of law is not developed in the global arena.

5. Judicial Globalization

Joseph H.H. Weiler, has summarised the *development of dispute settlement* in the global legal order in the following way: «[….] *one sees an initial stratum of horizontal, dyadic, self-help through mechanisms of counter-measures, reprisals and the like. This is still an important feature of enforcement of international legal obligation. Then, through the century, we see a consistent thickening of a triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like. The thickening consisted not only in the emergence of new area subject to third party dispute settlement but in the removal of optionality, in the addition of sanctions and in the general process of "juridification". Dispute settlement, the hallmark of diplomacy, has been replaced, increasingly, by legal process especially in the legislative and regulatory dimensions of international law making. And there is, here too, a third stratum of dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts, to apply and uphold rights and duties*

[29] On this provision, WTO Appellate Body, Japan – Measures affecting agricultural products, 22 February 1999, WT/DS76/AB/R, available at *http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/76ABR.doc*.

[30] S. CASSESE, *A Global Due Process of Law?*, (forthcoming).

emanating from international obligations»[31].

Since the 1990s, the number of international courts and tribunals has grown rapidly. Before this, there were only six operative international courts. In the last fifteen years, fifteen new permanent adjudicative mechanisms and eight quasi-judicial procedures have been introduced[32].

One of the most important global dispute settlement bodies is that of the WTO. Its development has been summarised by Alec Stone Sweet: «[w]*hen GATT (1948) entered into force and was institutionalized as an organization, "anti-legalism" reigned* [….]. *Diplomats excluded lawyers from GATT organs and opposed litigating violations of the Treaty. In the 1950s, triadic dispute resolution emerged in the form of the Panel System. Panels, composed of 3 – 5 members, usually GATT diplomats, acquired authority through the consent of two disputing States. In the 1970s and 1980s, the system underwent a process of judicialization. States began aggressively litigating disputes; panels began treating the treaty as enforceable law, and their interpretation of that law as authoritative; and jurists and trade specialists replaced diplomats on panels. The process generated the conditions necessary for the emergence of the compulsory system of adjudication now in place in the WTO*»[33].

After having considered the historical development of global courts, let us look at *four examples of courts or quasi-judicial bodies*.

Firstly, the World Bank Inspection Panel. This body protects the rights of interested parties that have been or are likely to be affected as a result of a failure of the Bank to follow its operational policies and procedures. This body is a cross between an administrative tribunal (in the British meaning of the word) and a court. Its task is to review an international organization decision or set of decisions.

Secondly, Article 1904 NAFTA Binational Panels. This global court has jurisdiction to review domestic agencies' decisions. It decides disputes in accordance with domestic law, not international trade rules. It is an international court for the judicial review of domestic agencies.

Thirdly, the Administrative Panels of the WIPO Arbitration and Mediation Centre for Uniform Domain Name Dispute Resolution. These have power to review national authorities' (registrars') decisions (despite the fact that parties to the dispute are only private individuals).

Fourthly, the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention provides that an Arbitral Tribunal shall decide «*any legal dispute arising directly out of an investment*» (Article 25). There must be consent to arbitration from the parties and the award is binding on the parties (Articles 53 and 27). The Tribunal decides disputes in accordance with such rules of law as may be agreed by the parties; in their absence, it decides according to the law of the contracting State party to the dispute and such rules of international law as may be applicable (Article 42).

Who are the *parties* that can appear before global courts? The answer is far from being uniform. Domestic authorities may appear before the Tribunal of the Law of the Sea. Private parties and the World Bank appear before the World Bank Inspection Panel. Both private parties and domestic authorities may appear before the Article 1904 NAFTA Binational Panel. Only private parties can appear before the Administrative Panel of the WIPO Arbitration and Mediation Centre, but the decision has an impact on the registrar's decision. The contracting State and nationals of another contracting State can appear before the ICSID Arbitral Tribunal.

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[31] J.H.H. WEILER, *The Geology*, cit., pp. 550-551. See also J.H.H. WEILER, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the International and External Legitimacy of WTO Dispute Settlement*, New York University School of Law, Jean Monnet Working Paper 9/00, available at *http://www.jeanmonnetprogram.org/papers/00/000901.html*.

[32] Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals,* Oxford, Oxford University Press, 2003, pp. 3, 5, 7-8.

[33] A. STONE SWEET, *Judicialization and the Construction of Governance*, in *Comparative Political Studies*, 32, 1999, no. 2, pp. 164-165.

Global courts' decisions have a *direct effect*. Therefore, global judgements penetrate into domestic law, lifting the veil of national law. Take as an example the decision of the International Tribunal for the Law of the Sea in the Juno trade case, 18 December 2004, para. 80: «[….] *the tribunal finds that the respondent has not complied with Article 73, para. 2 of the Convention, that the Application is well founded, and that, consequently, Guinea-Bissau must release promptly the Juno trader including its cargo and its crew, in accordance with para. 104*».

The *enforcement of global courts' decisions* has a distinctive feature. Take, for example, the WTO Dispute Settlement Body decisions. These can be self-enforced through sanctions imposed by the injured party according to the law and under judicial control.

As global courts cannot enforce their decisions «from above», enforcement comes through the reaction of the damaged party, which can seek compensation or can retaliate. Retaliation is made according to specific regulations and under judicial control.

The mechanism for enforcing global courts' decisions is provided by the above-mentioned Article 22 of the WTO DSU and by the NAFTA Agreement establishing the Commission for Labor Cooperation. In the latter case, Article 41 provides that, where a party fails to pay a «monetary enforcement assessment», determined because of a «persistent pattern of failure» to enforce labor standards, the complaining party may suspend the application of NAFTA benefits «in an amount no greater than that sufficient to collect the monetary enforcement assessment» and an Arbitral Panel determines whether the suspension is «manifestly excessive».

The process of judicialization should not be over-emphasized, because there is a strong continuity between traditional diplomatic negotiation and the new judicial dispute settlement.

Consider Arbitral Tribunal – Annex VII of the UNCLOS, Award on Jurisdiction and Admissibility, 4 August 2000 and the «effort to cooperate» (para. 78). This decision emphasizes the role of negotiation, mediation and consensual procedures. The International Plant Protection Convention, Article XIII provides for the settlement of disputes, consultation and the establishment of committees of experts. It then states: «*the contracting parties agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the contracting parties concerned of the matter out of which the disagreement arose*». There is not, therefore, a sharp distinction between dispute resolution and negotiation.

See also the ECJ decision in the Van Parys case, which privileged reciprocity and negotiation; the Court held that adjudication may play a role only upon condition of reciprocity.

Judicial globalisation raises three important questions:

a. how can jurisdictional competition be mitigated? Through forum selection or forum shopping? Or with parallel proceedings? Or through successive proceedings?[34]

b. how do global courts interact with domestic judiciaries? Is the relation between global and domestic courts complementary, competitive, or hierarchical? (bear in mind that national courts apply avoidance techniques or follow strategies of judicial involvement when international organizations appear before them[35]);

c. what is the stage of development of global courts? (compare with the history of the French Conseil d'Etat from the «justice rétenue» to the «justice déleguée» - 1872).

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[34] This problem is addressed by Y. SHANY, *The Competing Jurisdictions* cit., pp. 19 ff.

[35] A. REINISCH, *International Organizations Before National Courts*, Cambridge, Cambridge University Press, 2000, pp. 35 ff.

PART 2 - THE GLOBAL ADMINISTRATIVE PROCESS IN CONTEXT

1. From International to Global: a Matter of Terminology

Traditionally, looking beyond the law of the State, there was the «jus gentium» (or «jus inter gentes»). This definition survives in the German «Völkerrecht», but was supplanted by the word «*international*», introduced by the English philosopher Jeremy Bentham (1748-1832). For Bentham[36], international meant between one nation and another (both sovereign).

The international legal order has long been considered as a higher law, due to the medieval idea of «imperium romanum», that persists to the modern age. With the development of nationalities, Nation-States and the concept of State sovereignty, international law becomes a transactional law, resulting from contracts - either conventions or treaties – between States. A sharp dividing line was thus established between domestic law and international law (Triepel: «Landesrecht» and «Völkerrecht»[37]).

At the beginning of the 20th century, and especially after the First World War, new concepts and words began to appear:

a. *administrative international law* (or institutions), to mean the law relating to the relationships between a State's domestic administration, its nationals abroad and foreigners living or working in it;

b. *international administrative law* (or *international institutional law*), to mean the law relating to an international administration or organization[38] (for example, rules, procedures and institutions by which international organizations deal with employment disputes);

c. *supranational law* (or institutions), to mean the law of an organization standing above the States, like the European Union;

d. *transnational relations*, to mean the «*cross-border interactions involving non-state actors – multinational corporations, INGOs, epistemic communities and advocacy networks*»[39];

e. *post-national governance*, instead of global governance, because most international institutions are far from being global (for example, the United Nations excludes Taiwan, and not all the members of the United Nations (191) are members of the World Trade Organization (there are 148));

f. *transgovernmental networks*, to mean networks of national regulators;

g. *NGO and non-state actors*: «[w]*hile the terms "NGO", "private organization" and "independent sector" are generally synonymous,* [….] *"non-state actor" tries to embrace civil society, private persons, business enterprises, and pressure groups, at the international, regional, sub-regional, or even local and grassroot levels* [….]»[40];

h. *global law* (or institutions), to mean a higher level of autonomous law related to international organizations (but the French prefer the word «mondialisation» and some authors prefer to talk of «cosmopolitan law»);

i. *global administrative space*, a regulatory space that transcends international law and domestic administrative law, distinct from the inter-State relations;

j. *global administrative law*: «[….] *the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-*

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[36] J. BENTHAM, *Principles of International Law*, Bowring Edition of Bentham's Works, 1843, vol. 2.

[37] H. TRIEPEL, *Völkerrecht und Landesrecht*, Leipzig, 1899 (Italian translation, Torino, 1913).

[38] The German and Italian discussion on the concepts of international administrative law and administrative international law is summarised in U. BORSI, *Carattere ed oggetto del diritto amministrativo internazionale*, in *Rivista di diritto internazionale*, 1912, pp. 368 ff.

[39] T. RISSE, *Transnational Actors and World Politics*, in *Handbook of International Relations*, London, Sage, 2002, p. 268.

[40] E. RIEDEL, cit., p. 301.

governed mechanisms for implementing these standards, that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks, to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies». «*The focus of the field of global administrative law is not* [….] *the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, transparency, participation, and assurance of legality in global governance*»[41];

k. *private administrative law*, to mean law's recognition of private governance at the global level (for instance, public enforcement of standards established by private standard-setting bodies);

l. *regional institutions*, to mean organizations that are not world-wide, but cover a region like Europe, North America, South America, South East Asia.

The new concepts correspond to new developments in inter-State relations. They undermine the dualist paradigm of a sharp separation between domestic and international law. No longer are there two separate worlds. International law penetrates into the national sphere; it relies on domestic agencies for its implementation, but also keeps them in check.

The traditional approach to international law, which privileges States over global organizations, and treaties over the rules produced by global institutions, can only account for a limited part of the overall picture[42]. Global administrative law becomes an essential tool for understanding the regulation, adjudication and dispute settlement that takes place beyond the State[43] (and – as we have seen – inside the State and among the States).

2. The Global Constitution: Governance without Government

The first question is the following: does constitutionalization apply only to national legal systems? Can there be a «non-State - or global - constitutionalization»? A process of constitutionalization has already started at the global level through the strengthening of an international civil society, the creation of a global public sphere, the growing number of transnational networks and the proliferation of global courts[44].

But there is no government in this global constitution: in the global legal order «[….] *centralized authority is conspicuously absent* [….] *even though it is equally obvious that a*

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[41] B. KINGSBURY, N. KRISCH, R. STEWART, *The Emergence* cit., pp. 5-6 and 15-16. The word «global» was used for the first time in «The Economist» in 1959. «Globalization» was registered for the first time in 1961 in the Webster's New International Dictionary. This word has been widely used from the middle of the 1980's. In 2001 H. James published a book on *The End of Globalization* (Harvard University Press). See also S. BATTINI, *Amministrazioni internazionali*, and L. CASINI, *Diritto amministrativo globale*, in *Dizionario di diritto pubblico*, directed by S. Cassese, Milano, Giuffrè, 2006.

[42] International lawyers are rethinking the concept of international law: see B. W. KINGSBURY, *The International Legal Order*, IILJ Working Paper 2003/1 (History and Theory of International Law Series), available at *http://www.iilj.org/papers/2003/2003.1.htm*; P. SCHIFF BERMAN, *From International Law to Law and Globalisation*, in *Columbia Journal of Transnational Law*, 43, 2005, no. 2, p. 100; P. SCHIFF BERMAN, *Seeing Beyond the Limts of International Law: J.L. Goldsmith and E.A. Posner, The Limits of International Law*, University of Connecticut, School of Law Working Paper Series, Year 2005, Paper 39, available at *http://lsr.nellco.org/cgi/viewcontent.cgi?article=1038&context=uconn/ucwps*.

[43] J.H. H. WEILER, *The Geology*, cit.

[44] Some of these questions are addressed, with reference to the WTO, by D.Z. CASS, *The Constitutionalization of the World Trade Organization – Legitimacy, Democracy, and Community in the International Trading System,* Oxford, Oxford University Press, 2005, pp. 25-26, 48-52, and 242-243.

modicum of order, of routinized arrangement, is normally present in the conduct of global life»[45].

Two crucial questions for global governance are: is it made up of the three powers (legislative, executive and judiciary) characterizing governance at the State level? If so, which of these three powers is more developed?

To tentatively answer these questions: we do see the *three powers* in global governance as well, but there is more continuity between them, rather than a true separation of powers. Also, the executive branch is less developed here than in domestic legal orders, as the global machine relies on national implementation (*indirect rule*).

As for the *legislative power* (often referred to as non-contractual law-making, or non-conventional law-making, or non-treaty law-making), «[i]*nternational treaty law forms only the top level of the differentiated international normative order. Underneath the primary level, there is a secondary normative level. The rules appertaining to that secondary level are non-conventional for they are not set through the traditional treaty formation processes. Rather such rules involve actors that have been imbued with public authority under an empowering treaty. In developing the secondary regulatory function, international law addresses just the States, their several organs, and international organizations. But it reaches into the private sector professional associations, major groups of civil society, epistemic communities, NGOs, and individuals*»[46].

At the global level there are also *executive agencies*, like the United Nations Compensation Commission for Iraq, the Iraq-Kuwait Boundary Demarcation Commission, the Global Environmental Facility, the Prototype Carbon Fund[47]. These bodies carry out managerial tasks.

As for the *judicial branch*, «[….] *a growing number of courts and tribunals has emerged together with the increased number and importance of compulsory jurisdiction clauses, and* [….] *States are becoming accustomed to resort to courts and tribunals and to devise strategies in framing the issues they are confronted with so that they can be submitted to different adjudicating bodies* [….]». «*International adjudicating bodies, while keen on the separate and independent status States have bestowed upon them, are very much aware of each other's presence and activity. Not only do they rely on each other's case-law much more than they dissent from it, but they are ready to engage in constructive dialogue that, through cross-fertilization of their views, may bring about progress in the law*»[48].

Remember that:

a. in previous times, the rule was the following: «*law without adjudication is* [….] *the normal situation in international affairs*»[49];

b. according to Article 33.1 of the Charter of the United Nations, parties can choose any means they prefer for the peaceful settlement of disputes ;

c. only in the 1990's did quasi-judicial compulsory means of dispute settlement develop, whereby the complaining party can bring the case before an impartial body and the other party

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[45] *Governance without Government: Order and Change in World Politics*, edited by J.N. Rosenau and O. Czempiel, Cambridge, Cambridge University Press, 1992, p. 7. On the basic concept of governance and modes of governance, see also O. TREIB, H. BAEHR and G. FALKNER, *Modes of Governance: A Note Towards Conceptual Clarification*, European Governance Papers (EUROGOV) 05-02, available at *http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf.*

[46] V. RÖBEN, *Proliferation of Actors*, in *Developments*, edited by R. Wolfrum and V. Roeben, cit., p. 536.

[47] On the first two, E. DE WET, *The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions*, in *Developments*, edited by R. Wolfrum and V. Roeben, cit., p. 211 ss.; on the remaining agencies, E. HEY, *Exercising Delegated Public Powers – Multilateral Environmental Agreements and Multilateral Funds*, *ibidem,* p. 443 ff.

[48] T. TREVES, *Judicial Lawmaking in an Era of «Proliferation» of International Courts and Tribunals: Development or Fragmentation of International Law?*, in *Developments*, edited by R. Wolfrum and V. Roeben, cit., p. 619.

[49] J. G. MERRILLS, *International Dispute Settlement*, Cambridge, Cambridge University Press, 1991, II ed., p. 237.

cannot avoid a third party decision;

d. but «*in international law, every tribunal is a self contained system (unless otherwise provided)*» (Appeals Chamber of the International Tribunal for the Former Yugoslavia, decision on jurisdiction, 2 October 1995[50]). This suggests that there is no real judicial system as such.

Global governance raises many *analytic and normative questions*. The most salient *analytic questions* are:

a. do global rules bind national administrations and private individuals inside States, or do global administrations only have the power to make recommendations?

b. is there a core of command-and-control (i.e. that family of regulatory instruments that rely on orders given from governmental agencies to private individuals, which must be obeyed and can be enforced with recourse to police power) in the global administrative system?

c. are disputes settled only through judicial or judicial-like procedures or are they mainly settled through negotiation?

The most important *normative questions* are:

a. is there or should there be a direct or an indirect democratic legitimation of the global governance?

b. are global administrative organs (agent) accountable to a legislature (principal) or should they be?

c. is it possible to participate in the administrative process and obtain a review of the decisions or should it be? And are participation and review mechanisms available to national administrations or to private parties?

3. The Globalization of Democracy

Democratizing globalization and globalising democracy: the global legal order's relationship to democracy raises two important issues: first, there is the problem of the global machine's democratic legitimacy; second, there is the question of whether the global legal order may serve as a vehicle for the democratization of domestic governments.

Firstly, has the Global Machine established direct links with national civil society? Is the global legal order democratic and accountable? Which «demos» lends legitimacy to the global institutions? And to whom are these institutions accountable?

In cases like the Southern Bluefin Tuna, the Patent Cooperation and Tokios Tokelès v. Ukraine, direct links were established between global bodies and civil society. The SBT Commission issued orders to national fishing vessels; a national can directly petition an international body for an international preliminary examination for the protection of inventions (on patentability); the Tokios Tokelès v. Ukraine dispute, brought before a global court, was more a national dispute than a global one.

One of the most powerful global institutions, the WTO, has three problems: «*1. a lack of transparency in the* […] *process; 2. barriers to the participation of interested groups* [….]*; 3. the absence of politicians with ties both to the organization and to constituencies*»[51].

To study this first set of questions, one has to take two features of «cosmopolitan democracy» into consideration[52]. Unlike the States, cosmopolitan democracy is not rooted in an authoritarian

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[50] See «Tadic case», in *Rivista di diritto internazionale*, 1995, p. 1016, paragraph 11.

[51] R. O. KEOHANE and J. S. NYE JR., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, Harvard University, John F. Kennedy School of Government, Working Paper RWP01-004, 2001, available at *http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/$File/rwp01_004_nye_rev1.pdf*, p. 20.

[52] There is a rich literature on cosmopolitan democracy. See D. ARCHIBUGI, *La democrazia cosmopolitica: una prospettiva partecipante*, in *Rivista italiana di scienza politica*, XXXV, 2005, no. 2, p. 261.

legacy, which influences the quality of the democratic process[53], and it has – as we have seen – only a limited police power. Moreover, being younger, it has made use of a vast array of accountability mechanisms that have been introduced and tested only at a relatively later stage in the States' existence[54].

Secondly, can globalization favour the spread of democracy, by facilitating the transplant or development of democratic institutions in countries where such institutions are weak or non-existent? This raises further, related questions: «[i]*s military occupation likely to be the midwife of democracy? Can democracy be imposed by force from the outside? This is the assumption driving America's intervention in Iraq and posited a potential new pillar of ambition for US foreign policy elsewhere*»[55].

4. A Lawless World?

To appreciate the role of law in the global arena, one has first to get rid of the idea that global governance is a negotiated order, not subject to law: «*we are in a supra-state, acephalous world where, leaving self-help and ultimately warfare on one side, the institutional shapes found will be the product of and depend for their effectiveness upon, negotiated understanding*»; «*we should be very cautious in representing what are essentially negotiated orders at regional and global level as legal orders while they remain significantly different from those at the level of the state.*[….] *As radically different modes of ordering and decision are represented together as 'legal', law loses analytic purchase*»[56].

The global arena is not in such a primitive stage of development:one can find in it binding rules, addressed to private parties; an institutional setting, with organizations and well-established links between them; a set and many sub-sets of legal and physical persons, subject to the rules and institutional organization stemming from global bodies; rights and obligations. Is that not law?

If there is a global legal order, what is the role of law in the global arena and what *the role of the rule of law*?

The WTO Appellate Body in a famous case has recognized the rule of law: «[….] *Article X.3 of the GATT 1994 establishes certain minimum standards of transparency and procedural fairness in the administration of trade regulation which are not met here. The non transparent and* ex parte*_nature of the internal governmental procedures* [….] *as well as the fact that countries whose applications are denied do not receive formal legal procedure for review, or appeal from, a denial of application, are all contrary to the spirit, if not the letter, of Article X.3 of the GATT 1994*»[57].

In this case, the rule of law (transparency, right to a hearing and judicial review) is recognized by a global court, but applied to «internal governmental procedures». What about the global procedures themselves? Are global institutions required to abide by the rule of law, providing

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[53] On the role of the States' authoritarian legacy, L. MORLINO, *Spiegare la qualità democratica: quanto sono rilevanti le tradizioni autoritarie?*, in *Rivista italiana di scienza politica*, XXXV, 2005, no. 2, p. 191.

[54] L.A. DICKINSON, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law,* in *William and Mary Law Review,* 47, 2005, no. 1, p. 135.

[55] E. BELLIN, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, in *Political Science Quarterly*, 119, 2004-2005, no. 4, p. 595. See also F. ANDREATTA, *Democrazia e politica internazionale: pace separata e democratizzazione del sistema internazionale,* in *Rivista italiana di scienza politica*, XXXV, 2005, no. 2, p. 213.

[56] S. ROBERTS, *After Government? On Representing Law Without the State*, in *The Modern Law Review*, 68, 2005, no. 1, pp.18 and 23.

[57] WTO AB United States – Import prohibition of certain shrimp and shrimp products, 12 October 1998, WT/DS58/AB/R, available at *http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/58ABR.doc*.

transparency, the right to a hearing and judicial review of their own decisions?

As more and more national powers are transferred from domestic agencies to global authorities, can those authorities avoid granting private individuals the same rights that they otherwise enjoy in their national legal orders (transparency and disclosure of information, consultation, right to a hearing, requirement of reasoned decisions, judicial review)[58]?

A second set of problems derives from the particular *kind of global legalization* in question. «[….] [O]*ne important innovative element of the actual academic discussion about transnational governance is the application of private law categories to some classical domains of public law, to the analysis of legal institutions that claim legitimacy beyond their own will or self-interest – institutions like empires, churches, kingdoms, international organizations or states*». Global law is made up of «*a private law framework of public institutions*»*; it is* «*the result of spontaneous co-ordination efforts*»[59]

Lastly, the global law is becoming – as we have seen - court-centred: «[t]*he global law system finds its networking centres in global remedies, at the national, supranational and international level*»[60]. The global law system is dangerously taking after American adversarial legalism, a mixture of «[….] *adjudicatory systems give lawyers for the competing parties a very large and creative role in gathering evidence, formulating legal arguments, and influencing decisions – and hence foster an especially entrepreneurial and aggressive legal profession; a politically selected, somewhat unpredictable, and uniquely powerful judiciary; a fragmented governmental and court system* [….]». But «[….] *adversarial legalism is Janus-faced. It makes American government more responsive to individualized claims of justice and to the arguments of the politically less powerful, but it is also* [….] *a peculiarly cumbersome, erratic, costly, and often ineffective method of policy implementation and dispute resolution*»[61].

5. *Cui Prodest?*

Who profits from global legalization? Does the global legal order provide additional guarantees for private parties or does it provide an additional shelter for developed States at the expense of the «pariah States»[62]? Does it increase the impact of American legal imperialism in the World, by facilitating the export of American law[63]?

Legal globalization, like globalization itself (no-global go global, the French denounce globalization, but their companies embrace it[64]), is full of ambiguities:

a. the Internet Corporation for Assigned Names and Numbers (ICANN) has a global control of the Domain Name System, but is an American corporation, incorporated in California, and under Department of Commerce control.

b. «[t]*he rules which were intended to constrain others became constraining for their creators*»[65]. «*International rules promoting opportunities for American companies abroad are*

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[58] This point is made by S. BATTINI, *Quattro percorsi*, cit.

[59] C. MOELLERS, *Transnational Governance without a Public Law?,* in *Transnational Governance and Constitutionalism*, edited by C. Joerges, I-J Sand and G. Teubner, Oxford and Portland Oregon, Hart, 2004, pp. 329 and 337.

[60] A. FISCHER-LESCANO, *The Emergenz der Globalverfassung*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 63, 2003, pp. 717 ff. (also available at *http://www.zaoerv.de/63_2003/63_2003_3_a_717_760.pdf*).

[61] R.A. KAGAN, *Adversarial Legalism. The American Way of Law*, Cambridge MA, Harvard University Press, 2001, pp. IX and 164.

[62] P. MINNEROP, *Paria – Staaten im Völkerrecht?*, Berlin, Springer, 2004.

[63] See N. KRISCH, *Imperial International Law*, Global Law Working Paper 01/04, available at *http://www.nyulawglobal.org/workingpapers/detail/GLWP_0104.htm*.

[64] *Demon Monde*, in *The Economist*, July 2, 2005, p. 32.

[65] P. SANDS, *Lawless World*, *America and the Making and Breaking of Global Rules*, London, Allen Lane, 2005.

now being used to challenge American pollution and health standards».[66] The United States, if it wants to protect its investment abroad, has to accept that its domestic decisions are subject to global courts. The United States, if it wants the environment and endangered species to be protected in the world, must accept that global courts evaluate its relevant domestic policies. The strength of global law lies in the fact that the selective application of rules is difficult, as it runs against the principle of reciprocity. Global law is a two way street *par excellence* .

c. the United States Supreme Court should not impose «*foreign moods, fads or fashions*», according to Justice Scalia; «*yet Americans are happy to impose their own "fads and fashions" on others*»[67].

d. «[o]*n the one hand, dominant actors engage with international law, use it for their purposes and reshape it so as to better reflect their factual superiority. Yet insofar as international law doesn't bow to their demands – as it defends equality against hierarchy and stability against flexible change – powerful states withdraw: they try to limit the reach and impact of international legal rules on them and turn to the sphere of politics in order to achieve their goals. However, the simplicity of this picture, and in particular the dichotomy between international law and politics that it suggests, is misleading. Withdrawal from international law doesn't necessarily result in a rejection of law in favour of politics; instead it frequently leads to a substitution of domestic law for international law*»[68].

[66] P. SANDS, *Lawless World*, cit., p. 140.

[67] *The insidious wiles of foreign influence*, in *The Economist*, June 11, 2005, p. 41. On the role of American legal culture and tradition in the process of globalization, U. MATTEI, *Miraggi transatlantici, fonti e modelli nel diritto privato dell'Europa colonizzata,* in *Quaderni fiorentini*, 31, 2002, no. 1, p. 407.

[68] N. KRISCH, cit., pp. 36-37.

1. GLOBAL STANDARDS

1.1. International Accounting Standards-Setting and the IASC Foundation Constitution Review

The International Accounting Standards Board (IASB) is an international organization made up of private entities. The IASB establishes standards and guidelines for accounting (called International Accounting Standards – IAS). The IASB thus provides an example of global private standard-setting.

The international institutional structure for setting accounting standards is modelled after the American Financial Accounting Standards Board (FASB), and made up of four bodies. The IASB is the standard-setting body. The Standards Advisory Council (SAC), which represents the industry and the accountancy profession, is responsible for commenting on the IASB's projects. The International Financial Reporting Interpretation Committee (IFRIC), is charged with interpreting the accounting issues that are likely to receive divergent treatment in the absence of authoritative guidance; the IFRIC's interpretations (International Financial Reporting Standards - IFRS), which are valid only if approved by the IASB, are gradually increasing. Members of all the three bodies (the IASB, the SAC and the IFRIC) are appointed by the trustees of the International Accounting Standards Committee (IASC).

The IASB's standards have gained more and more prominence in recent years. They are part of the Financial Stability Forum (FSF)'s Compendium of Standards. Moreover, even the EU refers to IAS standards: from Regulation no. 1606/2002 (the IAS Regulation) on, a systematic incorporation of IAS/IFRS into European law has been effected (see paragraph 1.2).

The tendency of public bodies to refer to or incorporate standards originally established by private entities raises a number of problems concerning the legitimacy and accountability of the activity of these private bodies. How can the accountability of global private regulators be strengthened? How may global administrative tools be adapted to these bodies' activity and structures?

The IASC Foundation Constitution - which outlines IASB's structure and establishes the rules it must respect in performing its standard-setting activity – was first revised in 2001, and has recently undergone a second revision, specifically aimed at improving the IASB's legitimacy.

There were two main areas of revision: first, the number of the trustees (who appoint the IASB members) has been changed, in order to attain a more balanced geographical representation (in this way, the former Euro-American dominance has been weakened); second, the due process procedures that the Board must follow during the standard-setting phase have been strengthened. It is worth highlighting that the notice and comment procedure that was followed for the Constitutional revision itself might be regarded as an important step forward. On the other hand, attempts to change the financing rules in order to increase the IASB's independence did not succeed.

Main case:

- International Accounting Standards Board (http://www.iasb.org)
  The IASC Foundation Constitution, July 2005, available at
  http://www.iasb.org/about/constitution.asp
  The IASC Foundation Review of the Constitution, Proposals for Change, November 2004,
  available at http://www.iasb.org/uploaded_files/documents/8_949_2004-cons-itc.pdf

Sources:

a. IASC Foundation Constitution, July 2002
b. IASC Foundation, *Consultation paper*, *Identifying Issues for the IASC Foundation Constitution Review*, November 2003, available at http://www.iasb.org/uploaded_files/documents/8_887_UpdateontheConstitutionReview.pdf
c. Commission's response to changes proposed to the Constitution of the International Accounting Standards Committee Foundation (IASCF), 7 March 2005, *Letter from Alexander Schaub, Director-general, DG Internal Market and Services, European Commission and Annex*, available at http://europa.eu.int/comm/internal_market/accounting/docs/ias/ias-cf-consultation_en.pdf

References:

d. W. MATTLI and T. BUTHE, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting,* IILJ Working Paper 2005/4 (Global Administrative Law Series), available at http://www.iilj.org/papers/2005/documents/2005.4MattliButhe_000.pdf
e. S. BOTZEM and S. QUACK, *Contested Rules and Shifting Boundaries: International Standard Setting in Accounting*, in *Transnational Governance: Institutional Dynamic of Regulation*, edited by M.L. Djelic and K. Sahlin-Andersson, Cambridge, Cambridge University Press, 2006
f. D. KERWER, *Rules that Many Use: Standards and Global Regulation*, in *Governance*, 18, 2005, no. 4, pp. 611 ff.

1.2. Global Private Standards and Public Law: the EU Regulation on the Application of International Accounting Standards

Starting with the Commission's 1995 Communication, *Accounting Harmonisation: A New Strategy vis à vis International Harmonisation*, the EU's strategy in the accounting sector has changed steadily: from an approach based on the establishment of binding rules by EU organs, the EU has moved to an approach aimed at incorporating the recognized accounting standards and principles established by the International Accounting Standards Board (IASB), a private international organization (see para. 1.1).

This choice was motivated by the problem of the overly rapid obsolescence of the public rules (due to the long approval procedure), compared to the greater flexibility of the standards set forth by private regulators.

Regulation (EC) no. 1606/2002 (the IAS Regulation) provided for the systematic incorporation of the standards established by the IASB (IAS/IFRS): in this way, those global accounting standards which are originally established by private entities gain binding force through European recognition.

Nevertheless, Regulation (EC) no. 1606/2002 does not call for the simple incorporation of

internationally-recognized accounting standards, but sets forth an extremely complex procedure.

According to the IAS Regulation, when deciding on the applicability of IAS/IFRS, the European Commission must be assisted by two committees, which evaluate whether the international standards are conducive to the European public good, and whether they meet the criteria of understandability, relevance, reliability and comparability, usually required of financial information: the Accounting Regulatory Committee (ARC) is composed of representatives from the Member States (the political level of the endorsement process) and from the European Financial Reporting Advisory Group (EFRAG), which provides technical support and expertise. Finally, the Committee of European Securities Regulators (CESR) is charged with assisting the Commission in implementing the IAS.

The new European strategy for the accountancy sector thus provides the outlines for a hybrid public-private model, the consequences of which have yet to be explored. How does the public regulator control the private one? Is it a purely *ex post* control, or does the public regulator try to play a more active role in the international standard-setting process?

The EU makes the originally voluntary standards into mandatory ones; moreover, it does not hesitate to evaluate the compatibility of those standards with European law, and to monitor their effectiveness. The public enforcement of global private standards cannot be explained as a public body's retreat from the regulation of a specific sector (in this case, accounting): the rules which are enforced are not wholly private ones, but a hybrid private-public regulation takes place.

Finally, the EU's aim in participating in the international standard-setting process might have serious consequences: from this point of view, the incorporation of the IAS into European law can be seen as a kind of counterweight to the stronger position of EU vis à vis the global private standard-setter for accounting.

Main case:

- IASB – European Union (http://www.europa.eu.int)
  Regulation (EC) no. 1606/2002 of the European Parliament and of the Council, of 19 July 2002, *On the Application of International Accounting Standards*, OJ L 243, of 11 September 2002, pp. 1 ff.
  Communication from the Commission to the Council and the European Parliament, COM (2000) 359, of 13 June 2000, *EU Financial Reporting Strategy: the Way Forward*, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0359en01.pdf
  Communication from the Commission to the Council and the European Parliament, COM 95(508), of 14 November 1995, *Accounting Harmonisation: A New Strategy Vis à Vis International Harmonisation*, available at
  http://europa.eu.int/comm/internal_market/accounting/docs/com-95-508/com-95-508_en.pdf

Sources:

a. Commission Regulation (EC) no. 1725/2003, of 29 September 2003, and Annexes, *Adoption of Certain International Accounting Standards in Accordance with Regulation (EC) 1606/2002*, OJ L 261, of 13 October 2003, pp. 1 ff.
b. European Financial Reporting Advisory Group (EFRAG), *Adoption of the Amended IAS 39*, EFRAG Chairman's Letter of 8 July 2004
c. EU Accounting Regulatory Committee (ARC), *Opinion on IAS 39*, 5 October 2004
d. Commission Regulation (EC) no. 2086/2004, of 19 November 2004, *Amending Regulation (EC) 1725/2003 Adopting Certain International Accounting Standards in*

Accordance with Regulation (EC) no. 1606/2002 of the European Parliament and of the Council as Regards the Insertion of Ias 39, OJ L 363, of 9 December 2004, pp. 1 ff.

e. Committee of European Securities Regulators (CESR), *Proposed Statement of Principles of Enforcement of Accounting Standards in Europe*, Consultation Paper, October 2002, CESR/02-188b
f. Committee of European Securities Regulators (CESR), *Consultation on the Statement of Principles of Enforcement of Accounting Standards in Europe*, *Feedback Statement*, 12 March 2003, CESR/03-074
g. Committe of European Securities Regulators (CESR), *Standard no. 2 on Financial Information. Coordination of Enforcement Activities*, April 2004, CESR/03-317c

References:

h. P. LEBLOND, *The International Dimension of the Harmonization of Accounting Standards in the EU*, paper for delivery at the EUSA, Ninth Biannual International Conference, March 31 - April 2, 2005, Austin, Texas, available at http://aei.pitt.edu/2998/
i. S. FEARNLEY and T. HINES, *The Adoption of International Accounting Standards in the UK: a Review of Attitudes*, available at http://www.business.uiuc.edu/ciera/conferences/gottingen/Papers/Fearnley.pdf
j. K. VAN HULLE, *International Convergence of Accounting Standards*, in *Duke Journal of Comparative and International Law*, 12, 2002, no. 2, pp. 357 ff.
k. M. SCHMIDT, *On the Legitimacy of Accounting Standard Setting by Privately Organised Institutions in Germany and Europe*, in *Schmalenbach Business Review*, 54, 2002, no. 2, pp. 171 ff.

1.3. The Auditing Sector: the IFAC and the Establishment of the PIOB. Public regulators' control over a private standard-setter

The International Federation of Accountants' (IFAC) is a private international organization, which establishes standards for auditing.

This private body raises the core question of the accountability of global financial regulation.

One of the answers to this and related concerns has been the establishment of the Public Interest Oversight Board (PIOB), which is charged with overseeing the activity of the IFAC's auditing, ethics and education standard-setting committees. The PIOB includes eight members, seven of whom are nominated by the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors (IAIS) and the World Bank (WB): in this way, the transgovernmental networks in banking, securities and insurance regulation, and one international organization, seek to assert control over a private regulator. In addition to the establishment of the PIOB, further reforms of the IFAC's activity have been proposed, which aim at increasing transparency and participation in the standard-setting process.

How can the accountability gap of private regulators be addressed?

By analysing the proposals aiming to increase the IFAC's accountability, there currently seem to be two ways of responding to concerns about accountibility. First, by requiring private

regulators to make organizational changes, in order to encourage compliance with public interest safeguards. The second response focuses on procedural standards.

Two more questions entailed by this case are the following: to what extent does the American model of regulating the auditing sector shape the global one? Can we still frame the global regulation of auditing as an example of private regulation, or is it evolving toward a hybrid model, due to the increasing influence of public global regulators?

Main case:

- International Federation of Accountants (http://www.ifac.org/)
  IFAC, *Reform Proposals*, 19 September 2003, available at http://www.ifac.org/Downloads/IFAC_Reform_Proposals.pdf
  IFAC, IFAC's Standards-Setting Public Interest Activity, *Committees' Due Process and Working Procedures*, available at http://www.ifac.org/Downloads/PIAC_Due_Process.pdf

Sources:

a. Press Release, *International Regulators and Related Organizations Announce the Public Interest Oversight Board for the International Accounting Profession*, 28 February 2005, available at http://www.iosco.org/news/pdf/IOSCONEWS83.pdf
b. IFAC Board, *Proposed Revision to the International Federation of Accountants' Constitution, Invitation to Comment*, October 2005, available at http://www.ifac.org/Downloads/IFAC_Constitution_DRAFT.pdf
c. IFAC, *Amended and Restated International Federation of Accountants Constitution*, November 2005, available at http://www.ifac.org/About/IFAC_Constitution.pdf

1.4. Global Private Standard-Setting in the Financial Sector. The role of credit rating agencies in Basel II: publicly enforced global private standard-setting

Credit rating agencies such as *Standard & Poor's* or *Moody's* are private firms that provide an independent evaluation (the rating) of an issuer's credit-worthiness. A credit rating is an assessment of how likely an issuer is to make timely payments on a financial obligation. Credit rating agencies' assessments and opinions play an important role in capital markets, providing information and enhancing transparency.

According to some commentators, credit rating agencies are financial standard-setting bodies. Indeed, rating agencies use specific criteria when carrying out their evaluations and, with every rating, provide a brief note giving reasons for that specific assessment. Moreover, agencies periodically publish the criteria that they take into consideration in the rating process. From this point of view, therefore, rating agencies are genuine private financial standard-setting bodies.

The recent Basel II (which substitutes the Basel Capital Accord of 1988) modifies the ways of determining bank capital adequacy requirements, and, in doing this, it refers to ratings. Under the 1988 accord, one single method was used and this was valid for all banks. The new accord, by contrast, allows banks to choose between two methodologies for calculating the capital requirements for credit risks. According to the standardised approach, risk weights (and, consequently, the capital requirements that a bank has to respect) depend on the issuer's rating.

In this way, the activity of a private entity (i.e. a rating agency) is incorporated into regulatory

standards. It constitutes an effective example of hybrid regulation.

The enforcement of private standards by a public regulator makes the accountability gap of rating agencies even more crucial. Recently, there have been efforts aimed at enhancing the accountability of credit agencies through the establishment of codes of conduct. The International Organization of Securities Commissions (IOSCO), after a first report on the activities of credit rating agencies in 2003, published a *Code of Conduct Fundamentals for Credit Rating Agencies*, in order to reinforce the integrity of the rating process. But are these codes enough to cope with accountability concerns? Are there effective alternative methods for holding credit agencies accountable? Is it possible to adapt tools deriving from the national administrative law tradition to the credit rating agencies' case?

The same question might also be raised at the European level: on the one hand, a draft Directive designed to implement the Basel II rules is under discussion; on the other hand, the Committee of European Securities Regulators (CESR), giving technical advice to the European Commission about possible measures concerning credit rating agencies, decided to follow the same approach that the IOSCO followed, choosing the *Code of Conduct* model. Here again, accountability concerns are particularly pressing, as the Directive would give Basel's rules - which are in principle voluntary - binding force, thus giving ratings even more importance than they currently have.

Main case:

- Basel Committee on Banking Supervision (http://www.bis.org/bcbs/indez.html) International Convergence of Capital Measurement and Capital Standards: a Revised Framework (Basel II), available at http://www.bis.org/publ/bcbs107.pdf
- IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies*, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf

Sources:

a. Proposal for Directives of European Parliament and of the Council, *Recasting Directive no. 2000/12/EC of European Parliament and of the Council of 20 March 2000 Relating to the Taking up and Pursuit of the Business of Credit Institutions and Council Directive no. 93/6/EEC, of 15 March 2003, on the Capital Adequacy of Investment Firms and Bank Institutions*, COM (2004) 486 final, available at http://europa.eu.int/eur-lex/en/com/pdf/2004/act0486en05/1.pdf
b. CESR's Technical Advice (ref. CESR/05-139b), 30 March 2005, *CESR's Technical Advice to the European Commission on Possible Measures Concerning Credit Rating Agencies*, available at http://www.euractiv.com/29/images/CESR%20credit%20rating%20agencies%20March%2005_tcm29-151345.pdf
c. IOSCO's *Technical Committee's Report on the Activities of Credit Rating Agencies*, September 2003, available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD153.pdf

References:

d. D. KERWER, *Standardising as Governance: the Case of Credit Rating Agencies*, Max

Planck Projektgruppe, 2001, available at http://www.mpp-rdg.mpg.de/pdf_dat/001_3.pdf

e. H.E. JACKSON, *The Role of Credit Rating Agencies in the Establishment of Capital Standards for Financial Institutions in a Global Economy,* 2000, available at http://ssrn.com/abstract=250166, pp. 1 ff.

f. M.R. DAS GUPTA, *The External Accountability Gap of Private Regulators: Accountability Paradoxes and Mitigation Strategies. The Case of Credit Rating Agencies*, in *International Public Policy Review*, 1, 2005, no. 1, pp. 37 ff.

g. D. KERWER, *Holding Global Regulators Accountable: the Case of Credit Rating Agencies*, in *Governance*, 18, 2005, no. 3, pp. 453 ff.

1.5. The Internet Assigned Numbers Authority (IANA)

Public administrations often apply standards set by private international organizations. In addition to the financial and accounting sectors (see paragraphs 1.1, 1.2 and 1.3), this phenomenon can be observed in the area of Internet regulation as well.

The «network of networks» can be defined as a system of data exchange and communication, based on common technical parameters. Data compatibility is fundamental, in order to guarantee the functioning of the system: it could not work otherwise. This operation is permitted through the use of parameters called Internet Protocols (IP). The main one is the TCP/IP protocol, followed by World Wide Web (WWW), created in 1992 by the Geneva-based CERN.

The engineers and technicians who created the Internet also developed these parameters. They followed a method known as Request for Comments (RFC). In order to introduce a new technical arrangement, the Internet community's opinion was duly researched. If the results were favorable, then the new technical measure could be adopted.

This method was based on consensus and «bottom-up» coordination. No central authority was implied in this process (the administration had a merely financial role): the parameters were not imposed, but autonomously chosen. The parameters' functionality was privileged above all. This system also provides a meaningful example of standardization. Once a new parameter was adopted, it was then followed by all users and technicians. In this way, through homogenous technical rules, the functioning of the net was guaranteed.

The first RFC was adopted in 1969. Along with the Domain Name System (DNS: see paragraphs 6.4), RFC 1591 of 1994 is one of the most important. With its adoption, the system for the delegation of top-level domain names was definitively formalised. This system is still in use (see *infra*, paragraphs 2.1 and 5.4).

The Internet Assigned Numbers Authority (IANA), instituted for the management of the DNS, adopted this standard. Unilaterally governed by Jon Postel, a respected engineer, the IANA had no legal personality, nor it was incorporated. It operated out of the University of Southern California. Its functions, however, did not allow the IANA to impose binding codes on national States, not even just in the area of cyberspace (in particular, the code refers to the assignation of top level domain names: see para. 6.4). A solution was found with the adoption of an existing standard, developed by the International Standard Organization (ISO), to which States belong. In this way, the IANA used a standard created for other purposes, adapting it to the particular needs of the Internet. In this way, the IANA «imposed» codes on national governments.

In this area, we find two types of standard. The first is general, adopted for the multiplicity of domain names, originally divided in categories (like «.edu», «.org.», «.net»); the other one is sectorial, and it is referred to the alpha-numeric codes which identify geo-political regions (like

«.it» or «.uk»).

Important questions arise out of this case: how can a private organization, even one lacking in legal personality, impose its conclusions on national governments? And how can it define the «virtual borders» of States?

Main case:

- International Organization for Standardization (http://www.iso.org)
- Internet Assigned Numbers Authority (http://www.iana.org)
  Request for Comments 1591, available at http://www.ietf.org/rfc/rfc1591.txt?number=1591

Sources:

a. ISO 3166-1, available at http://www.iso.ch/iso/en/prods-services/iso3166ma/02iso-3166-code-lists/list-en1.html

References:

b. P. K. YU, *The Origins Of Cctld Policymaking*, in *Cardozo Journal of International and Comparative Law*, 12, 2004, no. 3, pp. 387 ff.
c. ISO, *ISO 3166-1 and Country Code Top-Level Domains (ccTLDs)*, available at http://www.iso.org/iso/en/prods-services/iso3166ma/04background-on-iso-3166/iso3166-1-and-ccTLDs.html.

1.6. Labour Standards

The International Labour Organisation (ILO), established in 1919 by the Treaty of Versailles, is one of the oldest international organizations.

It has a tripartite structure, made up of employers, labour unions and the governments of the Member States. In almost one century of activity, it has developed a complex system of labour standards: in the global context, it is the most important international setter, interpreter and enforcer of labour standards.

The ILO adopts Conventions and Recommendations. ILO conventions do not enjoy direct effect: the States must ratify them and transform them into national legislation. The recommendations do not depend on ratification, and they are generally used for clarifying the scope of a Convention or to regulate a sector where a Convention cannot be agreed upon.

The Organization also provides for four mechanisms to oversee Member States' observance of its standards. The first two formal procedures are set forth in Articles 24 and 26 of the ILO Constitution. Under Article 24, if an industial employers' or workers' association believes that a State has violated any Convention to which it is a party, it can make a claim with the International Labour Office. The Governing Body can establish a dialogue with the accused State, inviting it to clarify its reasons through the adoption of a report. If the State doesn't respond to the invitation in a reasonable time, or if the report is not exhaustive, the Governing Body has the right to publish the report and a possible statement.

Article 26 governs the second procedure aimed at guaranteeing the correct application of the ILO Conventions. In this case, the complaint may be brought by another State party to the Convention, by the Governing Body or by a Conference delegate. The Governing Body can undertake a dialogue with the State under article 24, or, name a Commission of Inquiry. The Commission of Inquiry investigates the complaint and adopts the appropriate recommendations. Every government interested in the complaint may, if it is not satisfied for Commission of Inquiry's conclusions, propose a claim before the International Court of Justice which, in turn, changes or confirms the recommendations already adopted. If the State that has committed the violation doesn't follow the recommendations made by the Commission of Inquiry or the International Court of Justice, then, under Article 33 of the Constitution, the Conference can adopt the necessary measures for the enforcement of the violated recommendations.

The other two control mechanisms are not set forth in the ILO Constitution, but rather operate before the Committee on Freedom of Association, which investigates the complaints made by trade unions and employers' associations regarding freedom of association and reports back to the Governing Body. The second mechanism consists in the regular supervision activity of the Committee of Experts for the Application of Conventions and Reccomandations (CEACR). Under Article 22 of the ILO Constitution, States must submit an annual report on their efforts to comply with the ratified Conventions. The CEACR solicits possible explanations for non-compliance in a dialectical conversation with the interested State. If the State does not resolve the problem, the CEACR adopts a report expressing its own doubts to the Conference. This is the only procedure that does not require a complaint in order to be activated.

In conclusion, the ILO's activity of supervision can only concern the behavior of governments. The workers' and employers' organizations can lodge complaints against any Member State. If the ILO determines there to be a violation, it adopts the necessary measures to guarantee the conformity to the rules, although it cannot also impose trade sanctions.

Among the decisions issued by the ILO, the most meaningful is probably that arising out of the case of Burma (Myanmar), which was accused of resorting to forced labour. A member of the ILO since 1948 (when it gained independence from England), Burma also ratified the ILO's Forced Labour Convention in 1955. But in the period following the 1962 military coup, the population has suffered gross violations of basic human rights, including forced lobour. The international community has reacted with sanctions of various kinds. In 1988, the World Bank (WB) and the International Monetary Found (IMF) suspended aid programmes and the withdrawal of tariff preferences.

The ILO's supervisory bodies reported Burma's violation and, in the course of the different control procedures, they affirmed the following four principles: a) the «accused» should be fully formed of allegations; b) the decision-making body should observe appropriate rules of evidence; c) the accused should have an opportunity to respond to the allegations; d) complaints should be resolved without undue delay.

The ILO's procedures to oversee Member States' compliance aim to realize the principles of transparency and fairness, while recognizing these standards' legal value. The ILO's role is therefore administrative: it sets the norms and it oversees Member States' compliance with them.

Main case:

- Forced Labour in Myanmar (Burma). *Report of the Commission of Inquiry*, Geneva, 2 July 1998, available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm
- Committee on the Application of Standards Sources, *Special Sitting to Examine Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced*

Labour Convention, 1930 (no. 29), Provisional Record, Ninety-third Session, Geneva, 2005

- Report of the Director-General, *A Global Alliance against Forced Labour*, Global Report under the Follow-up on the ILO Declaration on Fundamental Principles and Rights at Work, 2005, International Labour Conference, Ninety-third Session, Geneva, 2005

Sources:

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b. ILO Declaration on Fundamental Rights and Principles at Work, available at http://www.ilo.org/ilolex/english/index.htm
c. C29 Forced Labour Convention, 1930, available at http://www.ilo.org/ilolex/english/convdisp1.htm
d. International Labour Law, ILO Bureau for Workers' Activities http://www.itcilo.it/english/actrav/telearn/global/ilo/law/lablaw.htm

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j. R.M. STERN, *Labour Standards and Trade*, University of Michigan, Discussion Paper 496, 18 August 2003, available at http://fordschool.umich.edu/research/papers/PDFfiles/00-008.pdf
k. K.A. ELLIOT, *Labour Standards and the Free Trade Area of the Americas*, in *FTAA and Beyond: Prospect for Integration in the Americas*, edited by A. Estevedeordal, Dani Rodrik, Alan M. Taylor and A. Velasco, Cambridge MA, Harvard University Press, 2003, also available at http://www.iie.com/publications/wp/03-7.pdf

2. GOVERNMENT BY NEGOTIATION

2.1. Hybrid Public-Private Governance: the Internet Case and the Role of the ICANN

One of the peculiarities of Global Administrative Law emerges clearly in the case of Internet regulation: the presence of hybrid governance, which involves both public and private actors.

The Internet, born in United States in the 1960s, first developed through the adoption of technical arrangements aimed at facilitating data transmission, following a model necessarily based on consensus (see paragraph 1.5). This informal model lasted as long as the Internet was seen essentially as a means of communication between universities and researchers. In the 1990s, commercial growth, together with the relevance of the web as a medium of communication, required a new institutional framework. A private body, the Internet Corporation for Assigned Names and Numbers (ICANN), was entrusted with the supervision of the domain name system, IP addresses and technical parameters. After signing a Memorandum of Understanding with the US Department of Commerce in 1998, the ICANN began functioning.

ICANN is a non-profit corporation, incorporated under California law, in charge of the assignment and management of domain names, IP addresses, technical parameters and the root server system. Formally, it is not a public administrative body. In its role as supervisor and coordinator, it aims at avoiding any interference with domain name-related economic activity. Nonetheless, its strict ties with the US Department of Commerce (as well as the membership of its bodies, especially the Governmental Advisory Committee) have raised some crucial questions: is ICANN really independent of the national administration's control? What is the role of public actors in Internet governance?

Between 2003 and 2005, a debate unfolded at the World Summit on Information Society (WSIS) in its two meetings in Geneva and Tunis, which has highlighted the main problems relating to the role of ICANN and national States. The UN took an immediate interest in the question; the Secretary General instituted a committee, the Working Group on Internet Governance (WGIG), in charge of studying a new Internet governance system. WGIG published a report, presented in Tunis in November 2005, which has brought all of the above-mentioned problems to the fore.

Main case:

- Working Group on Internet Governance (http://www.wgig.org)
  Report of the Working Group on Internet Governance, Château de Bossey, June 2005, available at http://www.wgig.org/docs/WGIGREPORT.pdf

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b. Bylaws for Internet Corporation for Assigned Names and Numbers, as amended effective 28 February 2006, available at http://www.icann.org/general/archive-

bylaws/bylaws-28feb06.htm

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h. ID., *Understanding WSIS. An Institutional Analysis of the UN World Summit on the Information Society*, Internet & Public Policy Project, 2003, available at http://dcc.syr.edu/miscarticles/WSIS.pdf
i. *Initial Comments by the European Union and the Acceding Countries Romania and Bulgaria, on the Report of the Working Group on Internet Governance*, 2005, (Document WSIS-II/PC-3/CONTR/19-E), available at http://www.itu.int/wsis/docs2/pc3/contributions/co19.pdf

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k. D.W. DREZNER, *The Global Governance of the Internet: Bringing the State Back In*, in *Political Science Quarterly*, 119, 2004, no. 3, pp. 477 ff.
l. M. FROOMKIN, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, in *Duke Law Journal*, 50, 2000, no. 1, pp. 17 ff., also available at http://personal.law.miami.edu/~froomkin/articles/icann.pdf
m. ID., *Of Governments and Governance*, in *Berkeley Technology Law Journal*, 14, 1999, no. 1, pp. 617 ff.
n. ID., *Form and Substance in Cyberspace*, in *Journal of Small and Emerging Business Law*, 6, 2002, no. 1, pp. 93 ff., also available at http://personal.law.miami.edu/~froomkin/articles/formandsubstance.pdf
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q. M. MUELLER, *Roooling the Root: Internet Governance and the Taming of Cyberspace*, Sabon, MIT Press, 2002
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s. J. WEINBERG, *ICANN and the Problem of Legitimacy*, in *Duke Law Journal*, 50, 2000, no.1, pp. 187 ff., also available at http://www.law.wayne.edu/weinberg/legitimacy.PDF
t. J. ZITTRAIN, *ICANN: Between The Public and the Private Comments Before Congress*, in *Berkeley Technology Law Journal*, 14, 1999, no. 3, pp. 1071 ff.

2.2. Multipolar Conflict: the Chinese Textile Case

The People's Republic of China joined the World Trade Organization (WTO) on December 11, 2001. China's WTO adhesion protocol placed very strict conditions on it, in order to ensure a greater opening up of its markets. Since its adhesion, China's weight in the international trade system has considerably increased, and the influence of the Chinese power on worldwide economy has been felt especially in the area of textiles.

This was quite forseeable. Among the requirements and the conditions linked to China's adhesion, paragraph 242 of the *Report of the Working Party on the Accession of China*, which is an integral part of the Chinese WTO adhesion protocol, contemplates the possibility of China's accepting specific safeguard measures on its textiles exports until December 31, 2008. When the importation of Chinese textiles threatens the orderly development of trade in these products, any one of the WTO members can request consultations with China, with a view to easing or avoiding such market disruption. The EU Council followed upon this with regulation (EC) no. 138/2003, acknowledged the above-mentioned paragraph 242.

On January 10, 2005, with the expiration of the WTO Agreement on Textiles and Clothing, import quotas on specific categories of products were eliminated for WTO members. This agreement had limited textiles exports for a long time, and its expiration has definitely caused a change in the production and trading of such products.

The EU suffered the consequences of the new, open Chinese textile market in a particularly acute way. But to minimize the market distortion due to the expiration of the WTO Agreement, combined with China's dominant position, the EU adopted Regulation (EC) no. 2200/2004, setting up a surveillance system for the 35 product categories of textiles affected by the liberalization.

After a discussion, on June 10, 2005 the European Commission and the Chinese Ministry of Commerce signed a memorandum of Understanding on 10 categories of products whose imports threatened the regular development of the markets.

The quotas fixed in the *memorandum* apply to several products, so that now a large quantity of Chinese products remain blocked in European ports.

There are three different types of interests involved.

First: there are countries whose economies are heavily invested in manufacturing (France, Italy, Spain), and thus have interest in limiting Chinese imports. Second: there are nations with a well-developed service industry (Great Britain, Germany, Holland), which would prefer to take advantage of the favourable terms of Chinese textile imports. Third: there are manufacturers, importers and retailers that, due to the hold on the products, suffer significant economic losses.

On September 5, 2005, the European Commission and the Chinese Ministry of Commerce agreed to increasing the quotas and introducing a kind of flexibility for the categories of textiles and clothing that exceeded the quotas fixed in the *memorandum*.

Considering the current situation, we can surely foresee additional quotas to allow the clearance of all of the currently blocked textiles and clothing.

The agreements between the EU and China raise some particular problems: What regulating

systems are to apply? What procedures are provided by the GATT (General Agreement on Tariffs and Trade) and other similar agreements, in order to counterbalance the top-heavy Asian competition? What are the most suitable means for limiting market distortion? Would it be right to adopt protective measures, such as the respect of standard limits by these countries?

In consideration of Asian price-based competition, what kind of trade strategy could be developed for higher value products? Is the adoption of protective measures sufficient to ensure a well-proportioned development of international trade?

Main case:

- *Agreement between the EU and China on Chinese Textiles*, Beijing, 5 September 2005, available at http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/china_safeguards.htm
- *Memorandum of Understanding (MoU) between the European Commission and the Ministry of Commerce of the People's Republic of China on the Export of Certain Chinese Textile and Clothing Products to the European Union*, of 12 June 2005, available at http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/mou_tex_china_en.htm
- European Commission, *Statement of Reasons and Justification for the Request for Formal Consultations with China Concerning a Textiles-specific Safeguard Clause*, of 9 June 2005, available at http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/china_safeguards.htm
- European Commission, *Guidelines for the Use of Safeguards on Chinese Textiles Exports to the EU*, Brussels, of 6 April 2005, available at http://europa.eu.int/comm/trade/issues/sectoral/industry/textile/memo060405_en.htm

Sources:

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b. *General Agreement on Tariffs and Trade* 1994, available at http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf
c. *Accession of China to WTO*, Textiles-Specific Safeguard Clause (TSSC), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm
d. Commission Regulation (EC) no. 1478/2005, of 12 September 2005, *amending Annexes V, VII and VIII to Council Regulation (EEC) no. 3030/93 on Common Rules for Imports of Certain Textile products from Third Countries*, OJ L 236, of 13 September 2005, pp. 3 ff.
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c. H. BAYLEY and J. BOOZMAN, NATO Parliamentary Assembly, Formerly North Atlantic Assembly, *An Emerging China and the Transatlantic Economy*, International Secretariat, November 2005, available at http://www.nato-pa.int/Default.asp?SHORTCUT=794

2.3. Global Comitology: Member States' Participation in Global Decision-Making

The role of global committees (subsidiary bodies operating within international organizations) can be assessed by asking the following question: how do international organizations prepare and adopt their decisions?

As a general rule, international organizations decide by consensus: measures are approved if none of the parties put forward objections. This practice of unanimous agreement strengthens global decisions' legitimacy. Still, reaching unanimous agreement is not an easy task: therefore, all the decisions to be approved by the main bodies of the organization have to be carefully prepared. This task is entrusted to specialized committees, which are composed of national bureaucrats, representing their respective member States.

By using transgovernmental committees for the preparation and definition of global decisions, international organizations gain two benefits. First, the establishment of committees is a way to involve the same domestic administrations in decision-making that will be responsible for their implementation at the national level: as a consequence, it reduces the risk of member states' non-compliance and strengthens global decisions' effectiveness. Secondly, committees help in improving the efficiency of international organizations' decision-making: the main bodies can limit themselves to rubber-stamping decisions already agreed upon at the committee level; only controversial questions, not agreed to in the committee, need to be dealt with (i.e. substantially discussed and approved) by the main political bodies.

This is the way decision-making is structured in the World Trade Organization (WTO), for example. Measures are prepared by specialized plenary committees, where all the member States may participate. When the preparatory phase leads to a draft decision that is unanimously agreed upon, the competent WTO Council does not re-examine it: rather, the Council approves the text without discussion (according to the «A point» procedure). Committees are thus important tools for improving the efficiency and effectiveness of global decision-making.

Yet, in universal organizations – international organizations open to the participation of all States – a general problem arises: the large number of national delegations (often more than hundred) makes it difficult for committees to reach agreements in a short time. These organizations thus must face the following alternative: they can either establish preparatory committees with a non-plenary composition, assuming the consequent risk that States which are not represented in the committee will block the decisions already agreed by that secondary body; or they can accept the slowing down of the decision-making by preserving the (plenary) consensus rule in all the phases (even the preparatory one) of the process.

In other words, in the case of highly populated universal organizations, improving decision-making efficiency would (partially) imply giving up the consensus rule, enhancing the risk of national non-compliance and ultimately weakening the effectiveness of global decisions. By

contrast, full compliance with the consensus rule induces the «joint-decision trap»: the outcome is, in most cases, laborious negotiations leading to agreements on a minimum common denominator and thus decision-making inefficiency.

How do international organizations deal with this trade-off between efficiency and efficacy? Different solutions have been tested. The one adopted by the Codex Alimentarius Commission is particularly significant. Preparatory tasks are entrusted to non-plenary committees with a limited number of national delegations: some member States are thus excluded from the negotiations that take place within these committees. To balance the negative impact of this exclusion, domestic administrations which are not represented in the committee may be involved in the decision nonetheless: they are consulted on the different drafts of the proposed measure through a notice-and-comment procedure. Is this procedural participatory mechanism an appropriate solution? Does it lead to a proper balancing between the efficiency and efficacy of global decision-making processes?

Main cases:

- WTO Committee on Anti-dumping Practices, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm
- Codex Alimentarius Commission Codex Committees and Task Forces, available at http://www.codexalimentarius.net/web/committees.jsp

Sources:

World Trade Organization

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c. Procedures for Meetings of the Committee on Anti-dumping Practices, G/ADP/4, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple

Codex Alimentarius Commission

d. Codex Commission's Rules of Procedure, available at ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf
e. Procedures for the Elaboration of Codex Standards and Related Texts, available at ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf

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g. J.S. ODELL, *Chairing a WTO Negotiation, in Developing Countries in the Doha*

Round: WTO Decision-making Procedures and Negotiations on Trade in Agriculture and Services, *ibidem*, pp. 72 ff.

h. H.G. SCHERMERS and N.M. BLOKKER, *International Institutional Law*, The Hague, Nijhoff, 1997, pp. 282-286, 293-299 and 505-515

i. M. SAVINO, *The Role of Transnational Committees in the European and Global Orders*, in *Global Jurist*, forthcoming (see http://www.bepress.com/gj/).

2.4. Shared Powers: Global and National Proceedings in the International Patent Cooperation Union

The Patent Cooperation Treaty (PCT) is a multilateral treaty administered by the World Intellectual Property Organization (WIPO), based in Geneva. With this treaty, the contracting States established the rules that businesses must follow in order to file international patents. In particular, the PCT procedure represents an appropriate practice to guarantee legal protection in several European and non-European countries.

According to the PCT treaty and its enforcement regulations, the filing procedure is implemented as a mixed, part international and part national, administrative procedure. The initiation of the PCT procedure in the Geneva office gives rise to a series of activities in all the States designated by the business in its original application (i.e. those States in which the business has applied for a patent). The international part of the procedure relates to the search, while the final decision is taken at the national level.

The main problems with the PCT procedure lie in how the international office's activities are coordinated with those of the domestic administrations. The procedure usually starts in Geneva, and is completed in the interested State. However, it might also follow a different path, by starting at national level. The search is then performed internationally and the procedure ends in national offices. Since, in certain cases, the global administration must involve multiple national administrations, horizontal co-operation among the administrations of the interested States may also be required.

International and national activities thus join together is many different ways, which often also depends upon the strategy chosen by businesses. In fact, while the start of the national part of a PCT procedure is an essential requirement for filing the patent in the States designated in the original application, it is also subject to the discretion of the applicant business. On the other hand, the international part of the procedure, with the International Preliminary Examination, is useful for the applicant to better evaluate the States in which it would be more appropriate to pursue the patent protection procedure.

As examination activities are performed at international level, the PCT procedure presents at least two major issues in terms of the right to defence (or participation) and the justiciability of claims. How is a national business's right to participation to be conceived at the international search stage? What form of jurisdictional protection is granted to a national enterprise, and what courts have jurisdiction over the procedure, international courts or national ones?

Main case:

- Patent Cooperation Treaty, 19 June 1970, art. 31 ff., available at http://wipo.int/pct/en/texts/articles/atoc.htm

Sources:

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b. PCT Applicant's Guide – Volume I, available at http://www.wipo.int/pct/guide/en/gdvol1/index.htm#TopOfPage
c. New International Preliminary Examination Procedures at the european Patent Office, available at http://www.european-patent-office.org/index.en.php
d. WIPO – Working Group on Reform of the Patent Cooperation Treaty, First Session, Geneva, 12-16 November 2001, «Improved Coordination of International Search and International Preliminary Examination and the Time Limit for Entering the National Phase», available at http://www.wipo.org/edocs/mdocs/pct/en/pct_r_wg_1/pct_r_wg_1_2.doc
e. International Protection of Industrial Property – Patent Cooperation Treaty, available at http://www.wipo.int/pct/en/treaty/about.htm

2.5. Moving Professionals beyond National Borders: Mutual Recognition Agreements

The international mobility of students and graduates and the free circulation of professionals are often hindered by the lack of recognition of degrees and professional qualifications.

European norms and Court of Justice jurisprudence represent an essential legal basis for the national decisions regarding the free circulation of workers. The basic Community law on the professions has undergone a continuous evolution since the 1970s. The initial tendency was to set forth specific provisions for every profession through the adoption of sectorial directives. For instance, beginning in 1975, «automatic recognition» was established for doctors, dentists, veterinarians, pharmacists, nurses, midwifes and architects. Because of the impossibility of extending the sectorial system to all professions, two general directives were adopted to fill in the gaps in the sectorial regulation: directive (EEC) no. 48/1989 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and education and training of at least three year's duration, and the directive (EEC) no. 51/1992 on a second general system for the recognition of professional education and training to supplement directive (EEC) no. 48/1989.

The Court of Justice's recent decision on the issue is particularly interesting. The preliminary ruling before the Court of Justice had arisen out of a controversy between the *Colegio de Ingenieros de Caminos, Canales y Puertos* (Association of Civil Engineers) and the *Administraciòn del Estado* (State Administration) over the application of Mr. Imo, an Italian civil engineer. Imo had an Italian degree, with a specialisation in hydraulic engineering, and sought to practice as a civil engineer in Spain.The Spanish Ministry of Development recognized Imo's diploma and authorized him to practice in Spain without any preliminary conditions. The Colegio brought an action for the annulment of that order before the Audiencia Nacional (National High Court), stressing the fundamental difference between the profession of civil engineer in Spain and civil engineer specialized in hydraulics in Italy, and argued that recognition was inappropriate. The Audiencia Nacional dismissed the action. The Colegio brought an appeal against that judgment before the Tribunal Supremo, which decided to raise a preliminary ruling to the Court

of Justice under EC Treaty Article 234.

The Court gives an exhaustive reading of the directive (EEC) no. 48/1989. The purpose of recognition under the directives regime is to recognise a migrant's educational diplomas and training, where the regulated professional activities in the home Member State do not differ substantially from the education and training required in the host State. When this is not the case, the host Member State may require the migrant to make up for the difference. The compensation measure may relate only to substantial differences in education and training.

The directive (EEC) no. 48/1989 and no. 51/1992, integrated by the directive (EC) no. 19/2001, thus provides for a professional recognition system based on «mutual trust» among Member States, or rather on a degree of correspondence and reliability in education and training in one State which prepares someone to practice the same (or a corresponding) activity in another one; if there are substantial differences, recognition may be conditioned on the performance of specific compensatory measures.

Economic globalization also forces us to look at mutual recognition. This principle has been incorporated into the international trade regime through a reference in the General Agreement on Trade in Services (GATS). The abolition of restrictions on the trade in services would be futile where access to the provision of services was conditioned upon the possession of specific certificates or professional titles. To facilitate the removal of these obstacles, Article VII of the GATS allows WTO Members to reach mutual recognition with regard to «education or experience obtained, requirements met, or licenses or certificates granted». Recognition may be based upon an agreement between the interested parties, with the GATS allowing Members to deviate from the Most Favoured Nation (MFN) obligations of Article II and set up bilateral or plurilateral agreement on mutual recognition.

GATS Article VI, para. 6, on the other hand, requires that, in sectors where specific commitments regarding professional services are undertaken, each Member shall provide for an «adequate procedure» to verify the competence of professionals of any other Member. This article has two purposes: one, subordinating the validity of the titles to a verification of the competence of the foreign professionals, seeks to guarantee a minimum standard of consumer protection. Secondly, by only requiring an «adequate procedure», it leaves enough discretion to the Members' own systems for verification.

This analysis triggers the following questions: what are the repercussions of European and global standards for domestic law? Is there overlap between the different systems of regulation?

Main case:

- Eeropean Court of Justice (http://www.curia.eu.int)
  Colegio de Ingenieros de Caminos, Canales y Puertos, C-330/03, Judgment of 19 January 2006, available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:C:2006:060:0002:0003:EN:PDF

Sources:

European Union (EU)

a. Council Directive (EEC) no. 48/89, of 21 December 1988, *On a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration*, OJ L 019, of 24 January 1989, pp. 16 ff.
b. Council Directive (EEC) no. 51/92, of 18 June 1992, *On a Second System for the*

Recognition of Professional Education and Training to Supplement Directive no. 89/48/EEC, OJ L 209, of 24 July 1992, pp. 25 ff.

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m. Guidelines on Mutual Recognition Agreements, S/L/38 (28 May 1997), available at http://www.wto.org/english/news_e/pres97_e/pr73_e.htm

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o. Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 (17 Dec. 1998), *ibidem*

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3. GLOBAL PRINCIPLES FOR NATIONAL PROCEDURES

3.1. Legality: The Aarhus Convention and the Compliance Committee

In 2001, the President of the *National Atomic Company* (NAC) in Kazakhstan proposed that Parliament should amend the governing legislation, in order to allow foreign low and medium level radioactive waste to be imported into and disposed of on Kazakhstan territory. A group of NGOs asked the NAC President to provide a study of the feasibility of radioactive waste, justifying his proposal. The NGOs received no reply. Following various unsuccessful petitions to courts and other supervisory bodies on the national level, the NGOs submitted a communication to the Aarhus Convention's Compliance Committee, alleging non-compliance by the Republic of Kazakhstan with its Aarhus Convention obligations on access to information, public participation in decision-making and access to justice in environmental matters.

The Meeting of the Parties to the Aarhus Convention adopted decision I/7, setting up the Compliance Committee for the review of Parties' compliance with their Convention obligations. The Committee may examine compliance issues raised by Parties, the Secretariat or the public. Empowered to request information on matters under its consideration and to gather information on the territory of a Party, the Committee may prepare a report on compliance, make recommendations to the Party concerned and may request the Party concerned to submit a strategy regarding the achievement of compliance with the Convention, including a time schedule.

Nevertheless, the Meeting of the Parties has to decide upon the measures appropriate to achieve full compliance with the Convention. In this case (Decision II/5a, the Kazakhstan case), the Meeting requested the Government of Kazakhstan to bring its legislation and practice – its failure to provide for public participation, its lengthy review procedure, its denial of standing, its lack of clear regulation – into compliance with the Convention.

If it is true that global regulatory regimes have a strong impact on domestic regulation, and that compliance is monitored in global legal order, the main issue is, how does this happen? As was shown in this case, national institutions may be accountable to the public on compliance with the Aarhus Convention. Anyone may raise compliance issues before the Committee and the Committee becomes an essential tool for guaranteeing the direct effect of global public regulation. It might be suggested that the national executive powers are monitored for their infringements of the international law by a global dispute settlement body.

In environmental matters domestic authorities will be responsible to citizens for their conduct and their performance of this particular task. And this mechanism gives citizens the right to ask for an explanation by an international body. However, this regulatory regime raises three main issues. Firstly, it may overlap with other international remedies. Secondly, it establishes a high standard of compliance, but one that is focused on a narrow field. Finally, this accountability mechanism is binding.

Main case:

- United Nations Economic Commission For Europe (UNECE) (http://www.unece.org/)
- The Compliance Committee (http://www.unece.org/env/pp/compliance.htm)
  Decision II/5a Compliance by Kazakhstan with its obligations under the Aarhus Convention, available at http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.7.e.pdf

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a. Report of the First Meeting of the Parties Decision I/7 Review of Compliance, available at http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf
b. Report of the First Meeting of the Parties, 17 December 2002, available at http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf
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i. N.A. ROBINSON, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, in *Hastings International and Comparative Law Review*, 26, 2003, pp. 387 ff.

3.2. The Disclosure of Information: Anti-Dumping Duties and the WTO System

Following the April 1999 application for an anti-dumping investigation by the Defence Committee of Malleable Cast Iron Pipe Fittings Industry of the European Union, the European Community published a notice in its Official Journal, initiating an investigation on malleable cast iron tube or pipe fittings originating in Brazil, China, Croatia, the Czech Republic, the Federal Republic of Yugoslavia, Japan, South Korea and Thailand.

Industria de Fundicao Tupy Ltda. («Tupy») was the only Brazilian exporting producer investigated. In the course of the investigation, there were many communications and exchanges between the European Community and Tupy's legal counsel. A verification visit took place on Tupy premises in September 1999. There were also several communications between government officials of the European Community and Brazil relating to aspects of the investigation.

On 28 February 2000, the European Community imposed provisional anti-dumping duties (Reg. no. 449/2000), and, on 11 August 2000, adopted the definitive regulation (Reg. no. 1784/2000) on imports of malleable cast iron tube or pipe fittings from, *inter alia*, Brazil.

On 21 December 2000, Brazil requested consultations with the European Community and, on 7 June 2001, it requested the establishment of a panel.

The Panel concluded that the EC had acted inconsistently with its obligations under Article 2.4.2 of the Anti-Dumping Agreement, in «zeroing» negative dumping margins in its dumping determination, and Articles 12.2 and 12.2.2, in that it did not explain the lack of significance of certain injury factors listed in Article 3.4.

The Appellate Body (AB) upheld the Panel's findings, except on one issue. The AB found, in contrast to the Panel, that the European Community had acted inconsistently with the Anti-Dumping Agreement, in part by failing to disclose to interested parties during the anti-dumping investigation all of the information which could be necessary for the defence of their interests.

Brazil claimed that the EU had acted inconsistently with Articles. 6.2 and 6.4, according to which «Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests» and that the authorities «shall whenever practible provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases». In this case, the European Community had failed to disclose the information contained in one document, Exhibit EC-12. The Panel found that the European Community had not violated Articles 6.2 and 6.4 with respect to the information on injury factors referred to exclusively in Exhibit EC-12, because the facts contained in that document were in line with other data (which had been disclosed) and were not specifically relied upon by the EC in reaching the anti-dumping determination.

The AB reversed the Panel's findings, claiming that the obligations contained in Article 6 establish a framework of procedural and due process obligations, that apply *throughout* the course of the anti-dumping investigation (para. 138, AB Report). Moreover, the Appellate Body developed a more precise understanding of the requirements upon which documents must be disclosed under Article 6.4. Interested parties must be given a full opportunity to see information which: is relevant to the presentation of their cases, as judged by the interested parties themselves (rather than by the investigating authority: paragraph 145, AB Report); is not confidential; was used in the anti-dumping investigation (though it does not have to have been specifically relied upon in reaching the determination: paragraph 147, AB Report).

In the AB's view, the disclosure of information requirement is an authentic due process requirement. In this case, there is a disclosure of information duty for national authorities, established by an international treaty, and subject to a global court's control. Though only States can ask for the establishment of a Panel, the disclosure of information requirement is established in the interest of private parties: they use it in order to have a full opportunity for the defence of their interest. And the evaluation of whether the information is relevant or not is made with a view to the private parties' interest.

Main case:

- WTO Appellate Body (http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm)
- WTO Appellate Body Report, European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R, adopted on July 22 2003. Brazil, Appellant; European Communities, Appellee; Chile, Japan, Mexico and US, Third Participants. Division: Ganesan, Baptista and Sacerdoti

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c. General Agreement on Tariffs and Trade 1994, available at http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf
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3.3. A Duty to Provide Reasons: Definitive Safeguard Measures on Imports of Certain Steel Products

Under the 1947 General Agreement on Tariffs and Trade (GATT), safeguard measures were admitted by Article XIX (the GATT 'escape clause'). The obligations of Article XIX and the conditions under which States can establish safeguard measures were defined and developed during the Uruguay Round in the Agreement on Safeguards.

At the request of the United States Trade Representative (USTR), in June 2001 the United States International Trade Commission (USITC) initiated a safeguard investigation to determine whether certain steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury (or the threat thereof) to the domestic industry producing products like or directly competitive with the imported products. Therefore, the investigation aimed at verifying the requirements of the WTO Agreement on Safeguards. At the end of the investigation, the USITC made affirmative injury determinations for eight steel products, and forwarded its remedy recommendations in a report to the US President. Under Proclamation no. 7529 of 5 March 2002, the US President imposed ten definitive safeguard measures on imports of certain steel products. Imports from Canada, Mexico, Israel and Jordan were excluded from all the safeguard measures.

Considering that these measures were in breach of US obligations under the Agreement on Safeguards and 1994 GATT, on 7 March 2002 the European Communities requested consultations and, on 3 June 2002, the establishment of a Panel. Later on, pursuant to Article 9.1 of the DSU, the DSB referred to the Panel complaints on the same matter brought by Japan, Korea, China, Norway, Switzerland, New Zealand and Brazil.

The Panel issued eight Panel Reports – in the form of one document – and concluded that all ten safeguard measures imposed by the United States were inconsistent with the Agreement on Safeguards and the 1994 GATT. The Panel found that the US had violated the duty to «provide a reasoned and adequate explanation» in connection with each of the requirements necessary for the establishment of safeguards measures under the WTO Agreement. In particular, the US had failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to «increased imports», the «causal link» between the alleged increased imports and serious injury to the relevant domestic producers and to a «parallelism» between the products for which the conditions for safeguard measures had been established, and the products which were subject to the safeguard measures.

The Appellate Body extended its requirement for a «reasoned and adequate explanation» and made it more precise, stating that the Panel should have checked whether national authorities had respected this standard for each obligation of the safeguard investigation under the Safeguard Agreement (and also for the «unforseen developments» requirement, which is not in the Agreement, but comes from Article XIX of the GATT).

But what is the duty to provide reasons based upon? Is there a specific rule in the Safeguard Agreement, which requires it (and is it therefore limited to this sector)? Or is it a general principle, based on treaty interpretation? Are private parties involved in the recognition of this duty (i.e. does it create a participation right for private entities)?

According to Article 3.1 of the Agreement on Safeguards, «A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law». The United States argues that the USITC might have violated Article 3.1, but that a failure to provide a «reasoned and adequate explanation» of certain findings cannot also constitute a violation of Articles 2 and 4 of the Agreement on Safeguards and of Art. XIX of GATT 1994, contrary to what the Panel had concluded (paragraph 18, AB Report).

In the Appellate Body's view, the same standard of review – namely, the duty to provide a reasoned and adeguate explanation – applies generally to all the obligations under the Agreement on Safeguards, as well as to the obligations in Article XIX of the GATT 1994 (paragraph 276, AB Report). The AB drew these conclusions on the basis of Article 11 of the Dispute Settlement Understanding (DSU), which requires the Panel to «make an objective assessment of the matter before it, including an objective assessment of the facts of the case». According to the AB, if the competent authority had not set out a «reasoned and adequate explanation», the panel would not have beeen able to make an objective assessment of the matter before it, in conformity with Article 11 of the DSU (paragraphs 278 and 279, AB Report).

Therefore, through a creative interpretation of an international treaty, the duty to provide reasons was recognized as a general principle of WTO law, subjected to a global court's review.

Main case:

- WTO Appellate Body (http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) Report, United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, 249, 250, 251, 252, 253, 254, 258, 259/AB/R, adopted on December 10, 2003. United States, Appellant/Appellee; Brazil, China, European Communities, Japan, Korea, New Zealand, Norway and Switzerland, Appellant/Appellees; Canada, Cuba, Mexico, Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, Thailand, Turkey and Venezuela, Third Participants. Division: Bacchus, Abi-Saab and Lockhart, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/259ABR.doc

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3.4. Reasonableness and Proportionality: the NAFTA Bi-national Panel

The North American Free Trade Agreement (NAFTA) does not require its parties to harmonize their government subsidies and antidumping laws. NAFTA countries keep their own national regulations, provided that they comply with the minimum standards. However, they must accept a dispute settlement mechanism under NAFTA Chapter 19, which is an alternative to traditional harmonization measures. Thus, this system implies a kind of judicial review. When a foreign company doubts that a determination on antidumping or a countervailing duty complies with the law of the country where the determination was made, it can file a complaint to request the establishment of a bi-national panel made up of representatives from the two countries involved in the dispute. This adjudicating body will review the national determination by applying the law of the importing country, and not international trade rules.

The Canadian International Trade Tribunal's final determination has been challenged before a NAFTA bi-national panel. Once the panel's review procedure is initiated, no other domestic legal procedures can be commenced. The NAFTA bi-national panel reviewed the evidence supporting the action undertaken by the national administrative tribunal and the national determination. In particular, the NAFTA bi-national panel assessed the typical value of the goods, the identification of exporters and exporting prices.

What standard of review did the bi-national panel apply in assessing the decision's factual basis? To what extent do the expertise and skills of decision-makers and the specific nature of the subject matter lead to a significant degree of deference to the administrative tribunal's position under Canadian law? The requirements of fairness and reasonableness provided for in domestic legislation are then reviewed by this global adjudicating body, whose decisions are binding.

Main cases:

- NAFTA Binational Panel (http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76)
  Decision on Review of the Final Determination of the Commissioner of Customs and Revenue, Certain Iodinated Contrast Media, January 8, 2003, no. CDA – USA – 2000 – 1904 – 01, available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Canada/ca2000010e.pdf
  Decision on Review of the Canadian International Trade Tribunal Finding, Certain Iodinated Contrast Media, January 8, 2003, no. CDA – USA – 2000 – 1904 – 02, available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Canada/ca2000020e.pdf

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b. Finding and Statement of Reasons, Canadian International Trade Tribunal – CITT, Inquiry no. 99-003-2000, Ottawa, May 1, 2000.
c. Canada Customs and Revenue Agency, File no. 4240-21, Case no. AD/1234 (Final Determination – Iodinated Radiographic Contrast Media, March 30 2000), available at http://www.cbsa-asfc.gc.ca/sima/anti-dumping/ad1234f-e.html
d. Canada Customs and Revenue Agency, File no. 4240-21, Case no. AD/1234

(Decision on Remand – Iodinated Radiographic Contrast Media, July 10 2003), available at http://www.cbsa-asfc.gc.ca/sima/anti-dumping/ad1234sor-e.html

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l. H.E. MOYER JR., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, in *International Lawyer*, 27, 1993, no. 3, pp. 707 ff.
m. K. JONES, *Does NAFTA Chapter 19 make a difference? Dispute settlement and the incentive structure of US/Canada unfair trade petitions*, in *Contemporary Economic Policy*, 18, April 2000, no. 2, pp. 145 ff.

3.5. The Scope of National Regulatory Autonomy within the GATS: the Gambling Dispute

Some US state and federal laws affect the cross-border supply of gambling and betting services. On 21 March 2003, Antigua and Barbuda requested consultations with the United States regarding these measures and, on 12 June 2003, requested the establishment of a panel. In Antigua and Barbuda's view, the cumulative impact of the US measures resulted in the «total prohibition» on the cross-border supply of gambling and betting services from another WTO Member to the United States, and such a «total prohibition» is contrary to obligations of the United States under the General Agreement on Trade in Services (GATS).

The Panel's report (of November 10, 2004) found that the United States's GATS Schedule includes specific commitments for gambling and betting services (under the sub-sector entitled «Other Recreational Services except sporting»), and that three US federal laws and four state laws (out of the eight considered by the panel) violate US commitments under Article XVI

concerning Market Access. Further, the Panel found that the US had failed to make out a defence under Article XIV of GATS (which sets forth the general exceptions to GATS).

As a preliminary matter, the Appellate Body (AB) limited its findings to the three federal laws (as it found that the panel should not have ruled on the eight state laws of the United States, because Antigua had not made a *prima facie* case of inconsistency with the GATS).

The AB upheld the panel's decision, but on a narrower basis.

First, AB upheld the Panel's finding that the United States acted inconsistently with Article XVI, based on the following reasons: a) Article XVI only applies when the State has made a specific commitment, and AB found that the United States' Schedule includes a commitment to grant full market access in gambling and betting services; b) the US measures, though qualitative in nature (as they prohibit the «remote» supply of gambling services, which is to say, they require «face to face» supply), result in a quantitative restriction on market entry: therefore, the AB stated that «limitations amounting to zero quota are quantitative limitations and fall within the scope of Article XVI:2».

Second, the AB considered whether the US measures can be justified under Article XIV as a general exception. On this point, AB reversed the panel's finding that the United States had not shown that the three federal statutes are «necessary to protect public morals or to maintain public order», within the meaning of Article XIV; still, it upheld the panel's decision, finding that the US measures are discriminatory, for not applying in the same way to foreign and domestic service suppliers.

What limits does the GATS impose upon national regulatory autonomy concerning trade in services? What kinds of procedural requirements do States have to respect? The interpretation of the GATS in the Gambling Case may have much more profound consequences than the negotiating parties had imagined.

The first consequence stems from the (mis)interpretation of the distinction between market access and domestic regulation. Article XVI of the GATS prohibits, in principle, market access restrictions (such as import quotas or limitations of the number of services suppliers). But domestic regulations are allowed, as long as they do not discriminate against foreign service providers. Under Article VI.4 of the GATS, the Council for Trade in Services ought to develop further rules to ensure, *inter alia*, that national requirements are not more burdensome than necessary. Putting it differently, the GATS negotiators refused to impose a general necessity test on non-discriminatory domestic regulation, leaving the subject for future negotiations under Article VI.4.

In the Gambling Case, the AB chose a broad interpretation of «market access restrictions», which are *per se* prohibited under the GATS: as a matter of fact, it also interpreted qualitative national measures, which are usually conceived as domestic regulations, as market access restrictions (because qualitative measures can also have quantitative effects). Thus, the scope of national regulatory autonomy has been decreased: domestic service regulations that were considered to be presently immune, and subject only to future regulations currently under negotiation, could already be prohibited by the GATS as market access restrictions.

In the Gambling Case, the AB also performs an in-depth analysis of the «necessity test». In order to evaluate whether the US measures were necessary to protect public morals or to maintain public order, the AB clarified how the necessity standard must be examined. This part of the AB's decision is a continuation of the Shrimp case (it explains that whether a measure is necessary or not must be determined through a «process of weighing and balancing a series of factors», and how the comparison between the challenged measure and possible alternatives must be undertaken). But the AB takes one step back from the panel report, as the panel had argued that the necessity test imposed a procedural requirement on the United States to consult or negotiate with Antigua before it could take a measure to protect public morality or public order.

Main case:

- World Trade Organization (http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)
  Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (complaint by Antigua and Barbuda), WT/DS285/AB/R, adopted on the 7 April 2005, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/285ABR.doc
  Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (complaint by Antigua and Barbuda), WT/DS285/R, circulated November 10 2004, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-00.doc

Sources:

a. General Agreement on Trade in Services, available at http://www.wto.org/english/docs_e/legal_e/26-gats.doc
b. Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ARB-2005-2/19, 19 August 2005, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/285-13.doc

References:

c. J.P. TRACHTMAN, Survey on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, available at http://www.ejil.org/journal/curdevs/sr47.html
d. J. PAUWELYN, *WTO Condemnation of US Ban on Internet Gambling Pits Free Trade against Moral Values*, *American Society of International Law Insight*, November 2004, available at http://www.asil.org/insights/2004/11/insight041117.html
e. ID., *WTO Softens Earlier Condemnation of US Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, *American Society of International Law Insight*, April 2005, available at http://www.asil.org/insights/2005/04/insight050412.html
f. ID., *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, in *World Trade Review*, 4, 2005, no. 2 pp. 131 ff., also available at http://lsr.nellco.org/duke/fs/papers/25

4. DUE PROCESS IN THE GLOBAL LEGAL ORDER

4.1. The International Tribunal for the Law of the Sea: the Juno Trader Case

The United Nations Convention on the Law of the Sea entered into force in November 1994, setting up a comprehensive legal framework to regulate the use of marine resources.

The Convention provides for four different mechanisms for the resolution of disputes concerning its interpretation and its application: the International Court of Justice (ICJ), two arbitral panels and the International Tribunal for the Law of the Sea (ITLOS). The ITLOS is an independent court made up of 21 judges, elected by States parties to the convention.

According to Article 292 of the Convention, the ITLOS has jurisdiction over disputes between States parties to the convention, and can order the prompt release of vessels and crews in payment of a reasonable bond.

The Juno Trader was a refrigerated cargo vessel, flying the flag of Saint-Vincent and the Grenadines (which is a State party to the Convention on the Law of the Sea). It was stopped and boarded by officers of the Fisheries Inspection Service of Guinea Bissau, while fishing in the exclusive economic zone of Guinea Bissau (which is itself member of the convention). ITLOS was asked to review the detention of the vessel and the confiscation of the cargo, which included a large amount of fish, and to establish whether ITLOS rules had been violated by one of the two member states. The Tribunal declared that the provisions established by Article 73, paragraph 2 had been violated by the maritime authorities of Guinea Bissau, who hadn't respected the requirements of a prompt release of vessels, cargos and crews for the payment of a reasonable and adequate bond. Moreover, the tribunal found that the national administrative authorities of Guinea Bissau violated the principles of due process of law and reasonableness, which are implicit in the provisions of Article 73.

This case raises interesting questions about the role of global tribunals in national administrative procedures. What are the limits of their judicial review, and what principles can be applied? Are the only applicable principles those established by the Convention for the Law of the Sea?

Main case:

- International Tribunal for the Law of the Sea (http://www.itlos.org/)
  The Juno Trader case, December 18, 2004 n. 13, available at http://www.itlos.org/case_documents/2004/document_en_249.pdf

Sources:

a. United Nations Convention on the Law of the Sea of 10 December 1982, available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm
b. Application on behalf of Saint Vincent and the Grenadines, available at http://www.itlos.org/case_documents/2004/document_en_243.pdf
c. Declaration of Judge Kolodkin, available at http://www.itlos.org/case_documents/2004/document_en_250.doc

d. Separate Opinion of Judge Park, available at http://www.itlos.org/case_documents/2004/document_en_252.doc
e. Joint Separate Opinion of Judges Mensah and Wolfrum, available at http://www.itlos.org/case_documents/2004/document_en_253.doc
f. Separate Opinion of Judge Chandrasekhara Rao, available at http://www.itlos.org/case_documents/2004/document_en_254.doc
g. Separate Opinion of Judge Treves, available at http://www.itlos.org/case_documents/2004/document_en_255.doc
h. Separate Opinion of Judge Lucky, available at http://www.itlos.org/case_documents/2004/document_en_257.doc

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a. G. EIRIKSSON, *The International Tribunal for the Law of the Sea,* The Hague, Martinus Nijhoff, 2000
b. *International Tribunal for the Law of the Sea: Law and Practice*, edited by R. Khan and C. Rao, The Hague, Kluwer Law International, 2002
c. S. ROSENNE, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford, Oxford University Press, 2005
d. T. TREVES, *Le Tribunal international du droit de la mer et la multiplication des juridictions internationales*, in *Rivista di diritto internazionale*, 83, 2000, no. 3, pp. 726 ff.

4.2. The World Bank Inspection Panel: the Indian Mumbai Urban Transport Project Case

The World Bank Inspection Panel was established in 1993 by a joint resolution of the two organizations making up the World Bank (WB): the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The job of the Inspection Panel is to examine the complaints of private citizens, who live in an area affected by a WB-financed project, when their interests are (or could be) affected by the project, and when the project itself violatates internal WB procedures.

The Mumbai Urban Transport Project case regards a $463 million project financed in part by the IBRD and in part by the IDA ($79 million). The project envisaged substantial improvement of the Mumbai (India) transport system, and included the demolition of several homes and the transfer of 77,000 residents to other areas. The Panel received four inspection requests (28 April, 24 June, 29 November, 23 December 2004), by non-governmental organizations (NGOs), representatives of local businesses and residents.

These requests were consolidated due to their common subject matter. Considering the violations alleged in the initial requests, the two WB Management reports on the requests (27 May and 28 July 2004) and a provisional inspection of the affected area (22-27 June 2004), the Panel submitted a report to the WB Board of the Executive Directors (3 September 2004). The Panel declared the requests to be valid and asked for the authorization to carry out an inspection. This was approved by the Board on September 24, 2004.

This case illustrates how citizens' right to participate is recognized in a global administrative

procedure, and enables us to evaluate different aspects of the Panel and its activity. First, when the Panel allows private parties direct access to an international administration, does it create a diadic relationship (private actor - international organization) or a triadic one (private actor - State - international organization)? In other words, can the activity under inspection be attributed only to the private actor, or also to the State? Secondly, what is the legal status of the Panel? Is it a body with judiciary or oversight functions? Does it take final decisions? Is it possible to appeal the Panel's decisions?

Main case:

- World Bank Inspection Panel (http://www.inspectionpanel.org)
  India: Mumbai Urban Transport Project, Request no. 32, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20223785~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html
  India: Mumbai Urban Transport Project, Request no. 33, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20224887~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html

Sources:

a. World Bank Inspection Panel Policies and Procedures, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html
b. International Bank for Reconstruction and Development – International Development Association, Resolution no. IBRD 93-10/Resolution no. IDA 93-6, The World Bank Inspection Panel, 22 September 1993, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf
c. IBRD – IDA, Review of the Resolution Establishing the Inspection Panel. Clarification of Certain Aspects of the Resolution, (17 October 1996),available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf
d. IBRD – IDA, Conclusions of the Board's Second Review of the Inspection Panel. 1999 Clarifications, 20 April 1999, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf
e. World Bank Inspection Panel, Operating Procedures, 19 August 1994, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html
f. OP 4.01 Operational Procedures – Environmental Assessment, available at http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/9367A2A9D9DAEED38525672C007D0972?OpenDocument
g. OP 4.12 Operational Policies – Indigenous People, available at http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/0F7D6F3F04DD70398525672C007D08ED?OpenDocument
h. OP 4.12 Operational Policies – Involuntary Resettlement, available at

http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/CA2D01A4D1BDF58085256B19008197F6?OpenDocument

i. OP 4.12 Operational Policies – Project Supervision, available at http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/8C66E82CEB86163985256A8E00622FFC?OpenDocument
j. World Bank Policy on Disclosure of Information, Washington, 2002, available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/INFORMATIONDISCLOSURE/0,,contentMDK:20090035~menuPK:60001640~pagePK:199004~piPK:199030~theSitePK:222993,00.html

On The First Request (no. 32)

k. Register, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/GNPanelRegister.pdf
l. Request for Inspection, April 20, 2004, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/OfficialRequest04282004.pdf
m. The Inspection Panel, Notice of Registration, April 29, 2004, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/MumbaNoticeoRegistration.pdf
n. Management Response, May 27, 2004, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/MumbaiManagementResponse.pdf
o. Report and Recommendation on Requests for Inspection, September 3, 2004, (Eligibility Report, for the first and the second request), available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FinalEligibilityRepSEPT.pdf

On The Second Request (no. 33)

p. Register, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/GNPanelRegister.pdf
q. Request for Inspection, 22 June 2004, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/SecondRequestforInspectionIndiaMumbai.pdf
r. Notice of Registration, 29 June 2004, India – Mumbai Urban Transport Project available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/GNNoticeofRegistration.pdf#Notice_of_Registration
s. Management Response, 28 July 2004, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponseGazi.pdf

References:

t. *The Inspection Panel of the World Bank: A Different Complaints Procedure*, edited by G. Alfredsson and R. Ring, The Hague, Kluwer Law International, 2001
u. D. CLARK, *A Citizen's Guide to the World Bank Inspection Panel*, Center for International Environmental Law, 1999, available at

http://www.ciel.org/Ifi/IFIs_Inspection_Panel.html

v. D. CLARK, J. FOX and K. TREAKLE, *Demanding Accountability. Civil-Society Claims and the World Bank Inspection Panel*, Lanham, Rowman & Littlefield Publishers, 2003

w. J.A. FOX, *The World Bank Inspection Panel: Lessons from the First Five Years*, in *Global Governance*, 6, 2000, no. 3, pp. 279 ff.

x. D. HUNTER and L. UDALL, *The World Bank's New Inspection Panel: Will It Increase the Bank's Accountability?*, Center for International Environmental Law, available at http://www.ciel.org/Publications/issue1.html

y. B. KINGSBURY, *Operational Policies of International Institutions as Part of the Law-Making Process: the World Bank and Indigenous People*, in *The Reality of International Law Essays in Honour of Ian Brownlie*, edited by G. S. Goodwin-Gill and S. Talmon, Oxford, Clarendon Press, 1999

z. I. SHIHATA, *The World Bank Inspection Panel: in Practice*, II ed., Oxford University Press, Oxford, 2000

aa. L. UDALL, *The World Bank's Revised Information Policy and the New Inspection Panel: Public Accountability or Public Relations?*, in *Beyond Bretton Woods*, edited by J. Cavanagh, D. Wysham, M. Arruda, Boulder Colorado, Pluto Press, 1994, pp. 145 ff.

4.3. International Terrorism and Due Process

The UN 1267 Committee is a subsidiary body of the Security Council entrusted with the duty of maintaining a list of individuals associated with international terrorist organizations. UN member States are called upon to freeze the assets of individuals included on the list. Through their national implementation, the decisions of the 1267 Committee thus have important effects on the legal condition of the listed individuals. Are there procedural or judicial safeguards available to them?

At the global (i.e. UN) level, individuals affected by 1267 Committee's decisions are not given a right to be heard (or other procedural rights), nor the right to appeal a decision (since none of the existing international courts have the power to review UN committees'decisions).

What happens at the domestic (i.e. EU or State) level, which is where UN decisions have to be implemented? Are there remedies to counterbalance the lack of guarantees at the global level? Some possible answers can be drawn from the case of *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, case T-315/01, 21 September 2005 (see also *Ahmed Ali Yusuf and Al Barakaat International Foundation*¸ T-306/01, same date). Mr. Kadi was one of the individuals included on the 1267 Committee's list. He appealed the EU's decision to freeze his assets. This implementing measure was contested, insofar as it had been adopted at the end of a composite (global-European) procedure in which the affected person had enjoyed no procedural safeguards: neither the 1267 Committee, nor the EU decision-making body had recognised Kadi's right to a hearing.

The Community Court of First Instance rejected Kadi's appeal. According to the European court, the European decision was valid, since: a) it implements a UN decision that is binding upon both member States and the European Union; b) UN decisions produce binding effects which prevail over any other provision in case of conflict, including those established by the European Convention on Human Rights. Moreover, the European Court denied its competence to review the validity of UN Security Council decisions on the basis of Community law and

European fundamental rights (on this specific point, see para.7.1). The European Court's duty is, rather, to assess whether the challenged measure fulfils the universal standards concerning the protection of fundamental rights. The Court of First Instance concluded the following: the fact that individuals affected by Community measures (implementing UN decisions) have not been granted any right to be heard before the adoption of those measures, and cannot obtain the annulment of the decisions, does not amount to a violation of universal standards for the protection of fundamental rights.

The European Court's decision poses two sets of questions. The first concerns the specific content of the judgment: a) are national and European implementing measures really completely bound by a 1267 Committee's decision? b) What is the role of the European Convention on Human Rights? c) Do we agree that the rights to judicial review and due process are not universal standards for the protection of fundamental rights?

The second group of questions relates more generally to the safeguards protecting individuals against global decisions. A person included on the list updated by the UN 1267 Committee cannot directly ask for a re-examination of her/his own position. That person – according to the de-listing procedure established by Article 8 of the Committee's Guidelines – can only approache her/his own State (petitioned government). This State, before asking the 1267 Committee to review the issue, must consult the government that has provided the information motivating the Committee's decision (original designating government). At the end of the consultative phase, the re-examination can be asked jointly by the two States or exclusively by the petitioned government. The 1267 Committee decides on the request by consensus: in case of opposition (for instance, by the original designating government), the issue has to be dealt with by the Security Council for the final decision.

It is evident that the de-listing procedure follows the traditional diplomatic model: the affected individuals cannot address the international body directly, but only through their respective States; it is this government that, after consultation with the opposing State, can bring the issue before the international body, where every State has a veto power. In light of this procedure, another set of questions arises: does the traditional diplomatic model provide adequate power checking mechanisms for international decisions which directly impact individuals? If not, then how can private citizens be protected against global administrative measures? Would it be appropriate to transplant national procedural and judicial guarantees to the global level? In brief, can the rule of law exist beyond the nation State?

Main case:

- Court of First Instance, 21 September 2005, *Yassin Abdullah Kadi v. Council of the Erropean Union and Commission of the Erropean Communities*, case T-315/01, available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-315%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100
- Guidelines of the 1267 Committee for the Conduct of its Work, adopted on 7 November 2002, as amended on 10 April 2003 and revised on 21 December 2005, available at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf

Sources:

a. Charter of the United Nations, San Francisco, 26 June 1945, available at

http://www.un.org/aboutun/charter/

b. UN Security Council Resolution 1267 (1999) of 15 October 1999, on the situation in Afghanistan, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1267%20(1999)&Lang=E&Area=UNDOC
c. UN Security Council Resolution 1333 (2000) of 19 December 2002, on the situation in Afghanistan, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1333%20(2000)&Lang=E&Area=UNDOC
d. UN Security Council Resolution 1452 (2002) of 20 December 2002, on threats to international peace and security caused by terrorist acts, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1452%20(2002)&Lang=E&Area=UNDOC
e. UN Security Council Resolution 1390 (2002) of 16 January 2002, on the situation in Afghanistan, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1390%20(2002)&Lang=E&Area=UNDOC
f. UN Security Council Resolution 1526 (2004) of 30 January 2004, on threats to international peace and security caused by terrorist acts, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1526%20(2004)&Lang=E&Area=UNDOC
g. UN Security Council Resolution 1455 (2003) of 17 January 2003, on threats to international peace and security caused by terrorist acts, available at http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1455%20(2003)&Lang=E&Area=UNDOC
h. UN Security Council Resolution 1617 (2005) of 29 July 2005, on threats to international peace and security caused by terrorist acts, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1617%20(2005)&Lang=E&Area=UNDOC
i. Council Regulation (EC) no. 337/2000, of 14 February 2000, *Concerning a Flight Ban and a Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan*, OJ L 43, of 16 February 2000, pp. 1 ff., also available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000R0337:EN:HTML
j. Council Regulation (EC) no. 467/2001, of 6 March 2001, *Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, and Repealing Regulation (EC) no. 337/2000*, OJ L 67, of 9 March 2001, pp. 1 ff., also available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R0467&model=guichett
k. Commission Regulation (EC) no. 2062/2001, of 19 October 2001, *Amending, for the Third Time, Council Regulation (EC) no. 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan And Repealing Regulation (EC) no. 337/2000*, OJ L 277, of 20 October 2001, pp. 25 ff., also available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R2062&model=guichett
l. Council Regulation (EC) no. 881/2002, of 27 May 2002, *Imposing Certain Specific*

Restrictive Measures Directed Against Certain Persons and Entities Associated With Usama Bin Laden, the Al-Qaida Network and the Taliban, OJ L 139, of 29 May 2002, pp. 9 ff., also available at http://EUropa.eu.int/eur-lex/pri/it/oj/dat/2002/l_139/l_13920020529it00090022.pdf

m. Council Regulation (EC) no. 561/2003, of 27 March 2003, *Amending, as Regards Exceptions to the Freezing of Funds and Economic Resources, Regulation (EC) no. 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama Bin Laden, the Al-Qaida Network and the Taliban***,** OJ L 82, of 29 March 2003, pp. 1 ff., also available at http://europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb_docs=25&domain=Legislation&coll=&in_force=NO&an_doc=2003&nu_doc=561&type_doc=Regulation

n. European Convention for Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm

References (see also para. 7.1):

o. D. DYZENHAUS, *The Rule of (Administrative) Law in International Law*, IILJ Working Paper 2005/01 (Global Administrative Law Series), available at http://www.iilj.org/papers/documents/2005.1Dyzenhaus_001.pdf, pp. 13 ff. (also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 127 ff).

p. E.A. DOSMAN, *For the Record: Designating 'Listed Entities' for the Purposes of Terrorist Financing Offences at Canadian Law*, in *University of Toronto Faculty of Law Review*, 62, 2004, no. 1, pp. 1 ff.

5. JUDICIAL GLOBALIZATION

5.1. The Basis of the Model: the Rise of International Administrative Tribunals

Susana Mendaro, a citizen of Argentina, began work as a researcher at the World Bank (WB) in 1977. She joined a workforce of some 6,000 employees, recruited internationally to reflect the wide range of the member states. Ms. Mendaro fell victim to a pattern of gender discrimination and sexual harassment by her supervisors, which ended only when they fired her in 1979.

She brought a lawsuit against the World Bank in a US federal court for violation of the US Statute that forbids workplace discrimination and sexual harassment (Title VII of the 1964 Civil Rights Act).

Both the trial and appellate courts rejected Mendaro's claim, on the grounds that the International Organizations Immunities Act (IOIA) provides that «international organizations, wherever located, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments». The Court of Appeals held that immunity from suit fully applies to the Bank's employment contracts and its relations with its own staff members, like Ms. Mendaro. On April 30, 1980 the Board of Governors of the WB approved the establishment of the World Bank Administrative Tribunal. The Tribunal was created by the Bank to give employees legal recourse against institutional actions, which are alleged to violate their legal rights.

In 1985, the tribunal dismissed Mendaro's claim due to the expiration of the statutory time for filing it.

In other cases however, the Tribunal has expounded general principles meant to safeguard Bank employees (as attested by the Skandera case). Since 1981, the WB Administrative Tribunal has settled 300 disputes.

Why did international administrative tribunals come into existence? Under international law, this is a result of the immunity enjoyed by International Organizations. The greater specialization of international organizations, and the increased number of their employees, motivated the creation of an administrative tribunal charged with resolving employment disputes.

The international administrative tribunals guarantee legal accountability for the decisions made by supervisors and officials in managing the international organization's workforce. The employees of an international organization may obtain a final, binding determination for their workplace claims or grievances.

This kind of lawsuit could not be decided by a national court, because international organizations operate on the basis of their own law, which governs all internal affairs in pursuit of the organization's statutory purposes.

In the global area, in addition to the WB Administrative Tribunal, there are other significant examples of the international administrative aribunal: the Tribunal of the Asian Development Bank and the Administrative Tribunal of the International Labour Organization.

What kind of rules of law do they apply? What are their sources of law? The International Administrative Tribunals refer to distinct sources of law: the own internal policy statements and general principles of law.

Sometimes the tribunals must look beyond their own internal written documents. They must, for example, interpret the ambiguous language of some documents and determine priorities among conflicting documents and practices. In these cases, they decide on the basis of contract rules, which are a distillation of national law principles from both civil law and the common law. In addition, they have imported decision-making rules from the national administrative experience. In particular, the decision-maker may not take decisions arbitrarily or unreasonably,

and must practice fair procedures.

Main case:

- Administrative Tribunal of the World Bank (http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20295339~menuPK:64214665~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html)
  Mendaro, WBAT Decision no. 26 (1985), available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20579993~menuPK:64214668~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html
  Skandera, WBAT Decision no. 2 (1981), available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20579858~menuPK:64214668~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html
  De Merode, WBAT Decision no. 1 (1981), available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/EXTTRIBUNAL/0,,contentMDK:20579851~menuPK:64214668~pagePK:64214693~piPK:64214661~theSitePK:570681,00.html
- Administrative Tribunal of the Asian Development Bank (http://www.adb.org)
  Amora, ADBAT Decision no. 24 (1997), available at http://www.adb.org/Documents/Reports/ADBT/ADBT0024.asp
  Mesh & Siy, ADBAT Decision no. 35 (1997), available at http://www.adb.org/Documents/Reports/ADBT/ADBT0035.asp

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b. Statute of the Administrative Tribunal of the Asian Development Bank, available at http://www.adb.org/ADBT/ADBT_Statutes.pdf
c. Statute and Rules of the Administrative Tribunal of International Labour Organization, available at http://www.ilo.org/public/english/tribunal/stateng.htm

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d. *Discours de S. Exc. M. Gilbert Guillaume, Président de la Cour internationale de Justice, prononcé devant la Sixième Commission de l'Assemblée générale des Nations Unies*, available at http://www.lawschool.cornell.edu/library/cijwww/cijwww/cpresscom/SPEECHES/cSpeechPresident_Guillaume_SixthCommittee_20001027.htm
e. R.A. GORMAN, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, in *Comparative Labour Law & Policy Journal*, 25, 2005, no. 3,

pp. 423 ff., also available at http://www.law.uiuc.edu/publications/cll&pj/archive/vol_25/issue_3/GormanArticle25-3.pdf

f. G.H. GLEEN, M.M. KEARNEY and D.J. PADILLA, *Immunities of International Organizations*, in *Virginia Journal of International Law*, 22, 1982, pp. 247 ff.
g. T. MERON and B. ELDER, *The New Administrative Tribunal of the World Bank*, in *New York University Journal of International Law and Politics*, 14, 1981, pp. 1 ff.
h. C.F. AMERASINGHE, *The World Bank Administrative Tribunal*, in *International and Comparative Law Quarterly*, 31, 1982, no. 4, pp. 748 ff.
i. J. GOMULA, *The International Court of Justice and Administrative Tribunals of International Organizations*, in *Michigan Journal of International Law*, 13, 1991, pp. 83 ff.

5.2. Settling Global Disputes: the Southern Bluefin Tuna Case

In 1993, Australia, Japan and New Zealand signed a Convention for the conservation of the southern bluefin tuna, a species at risk of extinction.

The Convention provides for the establishment of a Commission, which is responsible for the enforcement of the Convention; in particular, it ensures the application of the Convention's provisions by member States. The Commission, furthermore, exercise its powers not only towards national States, but also towards private actors (the official text refers to «fishing entities»). In some cases, the Commission also acts in relation to third States, which are not members of the Convention at all: for instance, it can request non-Members States, whose vessels' fishing activities represent a threat to the tuna, to cooperate in order to assure the management and the conservation of living resources. It can also impose restrictive trade measures.

The 1993 Convention was signed one year before the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS, Montego Bay, 1982: see para. 4.1). The UNCLOS is a general convention (one of the most important contributions of the United Nations), while the former is sectoral. Both provide for dispute resolution mechanisms.

In this case, the Commission had fixed the total allowable catch of southern bluefin tuna. Japan, through the unilateral adoption of some experimental fishing programmes, exceeded the established quota. After negotiations had failed, Australia and New Zealand petitioned an UNCLOS arbitral tribunal, constituted in accordance with Article 286 and Annex VII of the UNCLOS. Before the award was rendered, both States appealed to the International Tribunal for the Law of the Sea, to request provisional measures.

The question of the applicable law was resolved in different ways by each of the two tribunals. Both tribunals are judicial organs established under UNCLOS provisions. Both recognize the existence of a plurality of norms, but can reach different solutions. The UNCLOS arbitral tribunal gives prevalence to the provisions of the Montego Bay Convention, since the 1993 Convention is complementary to it (in accordance with Articles 64, 116 and 119 of UNCLOS). The ITLOS, on the contrary, bases its decisions on Article 16 of the1993 Convention and its Annex. The arbitral tribunal decided that this norm constitutes a *lex specialis*, which trumps the competing UNCLOS provisions. As a consequence, it denied jurisdiction. Resolution of the case consequently depended upon negotiations between the parties.

The case raises some general questions. Do global administrative decisions exist? If these provoke a conflict among States, may a third, global judicial body intervene? What shall the

applicable law be?

Main case:

- International Tribunal for the Law of the Sea (http://www.itlos.org)
  Southern Bluefin Tuna Cases, August 27, 1999, n. 3 and 4, available at http://www.itlos.org/case_documents/2001/document_en_116.pdf
- Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, *Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, 4 August 2000, available at http://www.worldbank.org/icsid/highlights/bluefintuna/award080400.pdf

Sources:

a. Convention for the Conservation of Southern Bluefin Tuna, available at http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf (site of the Commission for the Conservation of Southern Bluefin Tuna-CCSBT)
b. United Nations Convention for the Law of the Sea (UNCLOS), art. 64; art. 116-119; art. 286-296; Annex VI, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf
c. Itlos, Rules of the Tribunal, available at www.itlos.org/documents_publications/documents/Itlos.8.E.27.04.05.pdf
d. Rules of Procedure of the Commission for the Conservation of the Southern Bluefin Tuna (CCSBT), available at http://www.ccsbt.org/docs/pdf/about_the_commission/rules_of_procedure_of_the_commission.pdf
e. Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna, available at http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf
f. CCSBT, 2000 Action Plan, available at http://www.ccsbt.org/docs/pdf/about_the_commission/action_plan.pdf
g. CCSBT, Resolutions pursuant to the 2000 Action Plan, available at http://www.ccsbt.org/docs/pdf/about_the_commission/resolutions_on_the_action_plan.pdf
h. CCSBT, SBT Statistical Document Program
i. Terms of References for Subsidiary Bodies, available at http://www.ccsbt.org/docs/pdf/about_the_commission/terms_of_reference_for_subsidiary_bodies.pdf

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l. A. BOYLE, *The Southern Bluefin Tuna Arbitration*, in *The International and*

Comparative Law Quarterly, 50, 2001, no. 2, pp. 447 ff.
m. C.E. FOSTER, *The «Real Dispute» in the Southern Bluefin Tuna Case*, in *International Journal of Marine and Coastal Law*, 16, 2001, no. 4, pp. 571 ff.
n. M. HAYASHI, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea*, in *Tulane Environmental Law Journal*, 13, 2000, no. 2, pp. 361 ff.
o. J. PEEL, *A Paper Umbrella which Dissolves in the Rain*, in *Melbourne Journal of International Law*, 3, 2002, no. 1, pp. 53 ff.
p. L. STURTZ, *Southern Bluefin Tuna Case*, in *Ecology Law Quarterly*, 28, 2001, no. 2, pp. 455 ff.
q. V. RÖBEN, *The Southern Bluefin Tuna Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 62, 2002, pp. 61 ff., also available http://www.zaoerv.de/62_2002/62_2002_1_a_61_72.pdf
r. Y. TANAKA, *Obligation to Co-operate in Marine Scientific Research and the Conservation of Marine Living Resources*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 65, 2005, pp. 937 ff.

5.3. The International Centre for Settlement of Investment Disputes: Tokios Tokelès Case

The remarkable development of international economic relationships in recent decades raises two main problems: first, how to provide guarantees to foreign investors against the economic, legislative and political policies of national public authorities; second, how to create the necessary conditions to increase financial and technical support of foreign enterprises. To this end, an International Center for the settlement of investment disputes (ICSID) was established by the Washington Convention of 1965.

The ICSID Convention set up an arbitration and conciliation mechanism for disputes related to contracts between States and foreign investors. Many national laws and bilateral treaties refer to the ICSID system. The Convention establishes that States Parties shall apply the dispute settlement procedure and shall execute the decisions adopted by the Center, which shall be binding on both the contractors and the States.

These rules also applied to the 2002 dispute between a Lithuanian corporation, *Tokios Tokelès* (whose shares were almost all held by Ukrainian nationals), and the Government of Ukraine. The corporation assumed that there was ICSID jurisdiction on the basis of the 1994 bilateral investment Treaty between Lithuania and Ukraine. The Ukrainian Government denied this, claiming that the enterprise controlled by *Tokios Tokelès* (*Taki Spravy*) was not owned by the State and the investment could not be qualified as such on the basis of the national legislation. Despite the strong dissenting opinion of the President, the Panel decided that there was ICSID jurisdiction over the dispute and denied provisional measures.

This case raises the following questions: how does the ICSID Convention establish its jurisdiction? Does the American «control test» apply within the ICSID system? What is the impact of ICSID rules on States Parties' domestic law? Do those rules limit public authorities's discretion in administrative procedures?

Finally, this case study has implications for both the unjustified exercise of public power in harm of foreign investors, and for the resolution by a global body of disputes between public and private contractors.

Main case:

- International Centre for Settlement of Investment Disputes (http://www.worldbank.org/icsid/) *Tokios Tokelès v. Ukraine, ICSID*, case n. ARB/02/18, available at http://www.worldbank.org/icsid/cases/awards.htm

Sources:

a. Icsid Convention, Regulations and Rules, January 2003, available at http://www.worldbank.org/icsid/basicdoc/basicdoc.htm
b. Introductory note, available at http://www.worldbank.org/icsid/cases/Tokios_Intro.pdf
c. Procedural Order no. 1 of July 1, 2003, available at http://www.worldbank.org/icsid/cases/tokios-order1.pdf
d. Decision on Jurisdiction of April 29, 2004, available at http://www.worldbank.org/icsid/cases/tokios-decision.pdf
e. Dissenting Opinion – Prosper Weil of April 29, 2004, available at http://www.worldbank.org/icsid/cases/tokios-dissenting_opinion.pdf
f. Procedural Order no. 3 of January 18, 2005, available at http://www.worldbank.org/icsid/cases/tokios-order3.pdf

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g. F.G. DE COSSÌO, *The International Centre for Settlement of Investment Disputes*, in *Journal of International Arbitration*, 19, 2002, no. 3, pp. 227 ff.
h. D.A. GANTZ, *Investor-State Arbitration Under ICSID. The ICSID Additional Facility and the UNCTAD Arbitral Rules*, 2004, available at http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf
i. M. POLASEK, *Tokios Tokeles v. Ukraine. Introductory Note*, in *Foreign Investment Law Journal*, 20, 2005, pp. 1 ff.
j. P. PRAWOKO, *An Analisys of Icsid Case Law on the State of Nationality of Foreign Investors*, in *Griffin's View on International and Comparative Law*, 6, 2005, no. 2, pp. 143 ff., available at http://www.rechten.vu.nl/griffinsview
k. T. WEILER, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary inteornational loaw*, London, Cameron May, 2005.
l. A.S. ZANNA, *Incorporation or Control? Contested Determinants of Corporate Nationality in «Tokios Tokelès v. Ukraine»*, in *Griffin's View on International and Comparative Law*, 6, 2005, no. 1, pp. 64 ff., available at http://www.rechten.vu.nl/griffinsview

5.4. The Uniform Dispute Resolution Policy of ICANN

The domain name system is organized in a hierarchical way: at the apex we have top level domain names (TLD), divided into general (gTLD, like «.org», «.com», «.net») and country code (ccTLD, like «.uk», «.fr», «.es» or «.it»: see *supra*, paragraphs 1.4 and 2.1). The registration of domain names is based on two types of functions, performed by different actors: registries and registrars. The former manage the registry of a particular TLD; the latter register new domain names and provide services to users. Sometimes these functions can overlap.

ICANN, a private entity established in 1998 under California law coordinates the functioning of the DNS (see paragraph 2.1). It has also served as a basis for the resolution of disputes related to Internet intellectual property rights, which required particular attention to domain names. Previously, there was legal uncertainty with regard to questions arising from the nature of domain names. Furthermore, national courts' decisions often differed. This was the reason for adopting a legally separate dispute resolution mechanism: in 1999, the ICANN adopted the Uniform Dispute Resolution Policy (UDRP), a private model inspired by a report from the World Intellectual Property Organization (WIPO).

The UDRP system presents some familiar characteristics: its legal basis consists of the rules adopted by the ICANN (supplemental rules may be added by dispute resolution service providers, like WIPO); decisions are binding upon the parties; privates actors may appeal to a global judicial body; recourse to national courts is permitted, even after the judicial body's decision has been taken.

This final feature, though rooted in the right to obtain judicial protection, may create further tensions. These tensions specifically concern the effects of the judicial body's decisions upon national courts seised with the same controversy. In the Barcelona case, which had to do with the registration of the domain name «barcelona.com», an American court stated that it was not constrained by principles and decisions adopted on the basis of the UDRP.

In order to provide the service of dispute resolution, the UDRP requires some conditions to be met. The subjects involved are the Registrars, who are required to enforce decisions. While this policy is compulsory in relation to gTLD, in relation to ccTLD, it is voluntary.

UDRP analysis, finally, is helpful in evaluating the effects of global judicial bodies upon national administrations. Casio.ro and Austrian-Airlines.fr are examples of complaints by private parties against national decisions, addressed to a global judicial body. One awkward issue is whether a global judicial body can bind a national administration. In this regard, these two cases show a meaningful difference: while in the latter case, the decision binds a private actor, in the former case it binds a public one (specifically, a branch of the central national administration).

Main cases:

- World Intellectual Property Organization, Arbitration and Mediation Center, UDRP – Domain Name Dispute Resolution (http://arbiter.wipo.int/center/index.html)
  Administrative Panel Decision, *Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, Case no. D2000-0505, available at
  http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0505.html
- United States Court Of Appeals for The Fourth Circuit, *Barcelona.com Inc. v. Excelentisimo Ayuntamiento de Barcelona*, no. 02-1396, available at
  http://www.case.info/domain/barcelona2.pdf

- Administrative Panel Decision, 22 July 2003 *Casio Keisanki Kabushki Kaisha, Casio Computer Co., Ltd v. Fulviu Mihai Fodoreanu*, Case no. DRO2003-0002, available at http://arbiter.wipo.int/domains/decisions/html/2003/dro2003-0002.html
  Administrative Panel Decision, December 28, 2004 *Austrian Airlines Österreichische Luftverkehrs AG contre Laurent Nunenthal*, Litige no. DFR2004-0003, available at http://arbiter.wipo.int/domains/decisions/html/2004/dfr2004-0003.html

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b. ICANN Rules, available at http://www.icann.org/dndr/udrp/uniform-rules.htm
c. Convention Establishing the World Intellectual Property Organization (July 14, 1967, as amended on September 28, 1979), available at http://www.wipo.int/treaties/en/convention/pdf/trtdocs_wo029.pdf
d. Wipo supplemental Rules for Uniform Domain Name Dispute Resolution Policy, available at http://www.arbiter.wipo.int/domains/rules/supplemental/index.html
e. Anticybersquatting Consumer Protection Act (ACPA), Pub. L. no. 106-113, § 3001 et seq., 113 Stat. 1501A-545 (codified in scattered sections of 15 U.S.C.), section 1114(2)(D)(v), available at http://www.gigalaw.com/library/anticybersquattingact-1999-11-29-p1.html

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g. ID., *The Anticybersquatting Consumer Protection Act and the Uniform Dispute Resolution Policy: New Opportunities for International Forum Shopping?*, in *Columbia Journal of Law and Arts*, 26, 2003, pp. 335 ff.
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j. ID., *Fundamentally Fair.com? An Update on Bias Allegations an the ICANN UDRP*, available at http://aix1.uottawa.ca/~geist/fairupdate.pdf
k. L.R. HELFER, *Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?*, in *Cardozo Journal of International and Comparative Law*, 12, 2004, no. 3, pp. 493 ff.
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m. M. MUELLER, *Rough Justice. An Analisys of ICANN's Dispute Resolution Policy*, available at http://dcc.syr.edu/miscarticles/roughjustice.pdf
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6. THE ENFORCEMENT OF GLOBAL DECISIONS

6.1. An Affirmative Response: Department of Transportation v. Public Citizen. The Domestic Implementation of International Regulatory Norms

Are domestic administrative decisions, implementing executive branch choices made at the international level, subject to the same regime of judicial review as exclusively domestic measures? The Supreme Court of the United States has held that the regime of judicial review cannot be the same, otherwise the executive's credibility in international negotiations would be undermined.

The case of *Department of Transportation v. Public Citizen* began with a moratorium, enacted by the US Congress in 1982, prohibiting Mexican trucks from operating within the United States, in response to the discriminatory treatment of US trucks by Mexico. This decision also authorized the President to extend, lift or modify the moratorium.

In 1994, Mexico and the United States signed the NAFTA. Nonetheless, US authorities did not review the 1982 prohibition. Only after a decision on this matter by the NAFTA international arbitration panel did the US President express his intention to lift the moratorium, on the condition that the Federal Motor Carrier Safety Administration (FMCSA) adopted new regulations. As is the case for all federal agencies, new regulations must be preceded by an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), and they must comply with the Clean Air Act (CAA).

The Environmental Assessment issued by FMCSA did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States, since such an impact would be an effect of the lifting of the moratorium and not of the implementation of new regulations. The Environmental Assessment was challenged, first before the Court of Appeals and then before the Supreme Court. The Supreme Court endorsed the FMCSA's conduct on the grounds that the FMCSA did not have the authority to prevent the environmental effect that might be caused by the new regulatory framework. In fact, though the FMCSA's action was a pre-requisite for the entry of Mexican trucks into the United States, the resulting environmental impact (and hence its consideration in the decision) had to be seen as an indirect effect, given the FMCSA's inability to countermand the President's lifting of the moratorium.

The case of *Department of Transportation v. Public Citizen* shows that administrative agencies must conform to commitments undertaken in international fora. To what extent may an agency be hindered in performing its responsibilities due to an international obligation? In other words, to what extent may the decisions taken in global fora escape the judicial review applied to exclusively domestic acts?

Main case:

- Supreme Court of the United States (http://www.supremecourtus.gov/)
  Department of Transportation v. Public Citizen, June 7, 2004, 541 US 752 (2004), available at http://a257.g.akamaitech.net/7/257/2422/07june20041115/www.supremecourtus.gov/opinions/03pdf/03-358.pdf

Sources:

a. Environmental Impact Statements (EISs), available at http://cfpub.epa.gov/compliance/nepa/current/
b. Clean Air Act, 42 U. S. C. §7506, available at http://www.epa.gov/oar/oaqps/peg_caa/pegcaain.html
c. North American Free Trade Agreement, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78
d. National Environmental Policy Act (NEPA), 42 U. S. C. §§4321-4375
e. Council of Environmental Quality (CEQ), §1515
f. Federal Motor Carrier Safety Administration (FMCSA), 49 U. S. C. §113

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g. R. B. STEWART, *US Administrative Law: A Model for Global Administrative Law*, IILJ Working Paper 2005/7 (Global Administrative Law Series), available at http://www.iilj.org/papers/documents/10120503_Stewart.pdf (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 82 ff.)
h. E. BENVENISTI, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institution*, available at http://www.law.duke.edu/journals/lcp/articles/lcp68dsummerautumn2005p319.htm (now also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 319 ff.)
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6.2. A Negative Response: the Metaclad Corporation Case

The case *United Mexican State v. Metaclad Corporation* provides an interesting example of domestic courts' involvement in reviewing the decisions of global institutions. The dispute arose out of the construction of a landfill in Mexico by a business owned and operated by the Metaclad Corporation (an American company). Metaclad had obtained permission from both federal and State authorities to construct the landfill. Demonstrations took place at the inauguration of the landfill, which kept it from opening. Metaclad reached an agreement with federal environmental agencies setting forth the conditions under which the landfill would operate. The local government, however, obtained an injunction against the operation of the landfill. Metaclad filed an arbitration claim with the International Centre for Settlement of Investment Dispute (ICSID), complaining of a breach by Mexico of the obligation to grant fair and equitable treatment in investment matters under Chapter Eleven of the North American Free Trade Agreement (NAFTA). The arbitral tribunal awarded damages against Mexico to Metaclad. Mexico sought permission to appeal the award to the Supreme Court of British Columbia (Canada), invoking the provisions of both the Commercial Arbitration Act and the International Commercial Arbitration Act. The Court set aside the part of the arbitral award determining the calculation ofinterest.

This case illustrates the problems in the relationship between national courts and global courts.

Many questions arise from this case: may national courts really review the decisions of global courts? Is such review legitimate? What is the scope of these judgments? How wide is the involvement of national courts in checking the decisions of global institutions? Does this kind of check promote or obstruct the development of global law?

Main case:

- The Supreme Court of British Columbia
  Reason for Judgment, 2 May 2001, The United Mexican State v. Metaclad Corporation (2001 BCSC 664), available at http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf
- Supplementary Reason for Judgment, October 31, 2001, The United Mexican State v. Metaclad Corporation (2001 BCSC 1529), available at http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/01/15/2001bcsc1529.htm
- International Centre for settlement of Investment Disputes (ICSID)
  Award of the Tribunal, 30 August 2000, The United Mexican state v. Metaclad Corporation case no. ARB 97/1, available at http://www.worldbank.org/icsid/cases/mm-award-e.pdf

Sources:

a. North American Free Trade Agreement (NAFTA), Chapter 11, available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78
b. International Commercial Arbitration Act (International CAA), R.S.B.C 1996- *British Columbia*, available at http://www.qp.gov.bc.ca/statreg/stat/I/96233_01.htm
c. International Centre for Settlement of Investment Disputes (ICSID), Additional Facility Rule, available at http://www.worldbank.org/icsid/facility/facility.htm

References:

d. A.A. ESCOBAR, *Introductory Note to the Case*, in *ICSID Review-Foreign Investment Law Journal*, available at http://www.worldbank.com/icsid/cases/mm-intro.pdf
e. B. KINGSBURY, N. KRISCH and R. STEWART, *The Emergence of Global Administrative Law,* IILJ Working Paper 2004/1 (Global Administrative Law Series), available at http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf (also published in *Law and Contemporary Problems*, 68, 2005, no. 3-4, pp. 15 ff.)
f. E. AISBETT, L. KARP and C. MCAUSLAND, *Regulatory Takings and Environmental Regulation in NAFTA's Chapter 11*, Department of Agricultural & Resource Economics, Working Paper 1014, 21 February 2006, available at http://are.berkeley.edu/~aisbett/files/iia21feb06.pdf

6.3. A Compromise Response: Measures Affecting the Importation of Apples

Japan took restrictive measures against the importation of apples from the United States, alleging them necessary to avoid the introduction of fire blight into the country. On March 1, 2002 the United States requested consultations with Japan, and on March 7, 2002 it requested the establishment of a WTO panel.

The United States claimed that the Japanese measures violated Article 2.2 of the Sanitary and Phytosanitary Agreement (SPS), because they were not based on sufficient scientific evidence, and Article 5.1 of the SPS, because there hadn't been a proper risk evaluation of the real possibility of an introduction of fire blight into Japan.

The Panel Report of July 15, 2003 mainly accepted the Unites States's claim. It held that the Japanese phytosanitary measures on apple importation were disproportionate to the real risk of the introduction of fire blight in Japan and thus inconsistent with Articles 2.2 and 5.7 of the SPS Agreement; there was not sufficient scientific proof to demonstrate the risk of a transmission of the bacterium *E. Amylovora* to healthy apples or other plants. The Appellate Body (AB) Report of November 26, 2003 confirmed the Panel's conclusions.

Japan agreed to comply with the decision and to a reasonable period of time within which to meet its obligations. But when Japan failed to comply within the deadline, the US requested the establishment of a proper Panel, following the procedure pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU). After the publication on June 23, 2005 of the Report of the new Panel, Japan and US reached a further agreement on the execution formalities on September 2, 2005.

From the analysis of the Panel's evaluations, we can see that this body did more than just review the legitimacy of the act. The Panel, by accepting the US claim and by evaluating the proportionilty of the measures to the real risk represented by fire blight, has definitely performed a judgment on the merits. This raises some questions: how do global courts decide, and can they be subject to judicial review? Why should an international court limit its evaluation to merely reviewing the legitimacy of the act? Do national judicial models apply to global courts as well?

Main case:

- WTO Dispute Settlement Body (http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)
  Panel Report, Japan – Measures Affecting the Importation of Apples, WT/DS245/R, 15 July 2003, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/245R.doc
  Report of Appellate Body, Japan – Measures Affecting the Importation of Apples, AB-2003-4, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/245ABR.doc

Sources:

a. Sanitary and Phytosanitary Measures (SPS), available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf
b. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf
c. Agreement on Agriculture, available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf
d. General Agreement on Tariffs and Trade 1994, available at

e. http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf
f. Request for Consultations by the United States, Japan – Measures Affecting the Importation of Apples, WT/DS245/R, 6 March 2002, available at http://docsonline.wto.org/DDFDocuments/t/G/AG/GEN50.doc
g. Report of the Panel, Recourse to Article 21.5 of the DSU by the United States, Japan – Measures Affecting the Importation of Apples, WT/DS245/RW, 23 June 2005, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm
h. Notification of Mutually Agreed Solution, Japan – Measures Affecting the Importation of Apples, WT/DS245/R, 2 September 2005, available at http://docsonline.wto.org/DDFDocuments/t/G/AG/GEN50A1.doc

References:

a. Survey from J.P. TRACHTMAN, available at http://www.ejil.org/journal/curdevs/sr44.html
b. J.H.H. WEILER, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, New York University School of Law, Jean Monnet Working Paper 9/00, available at http://www.jeanmonnetprogram.org/papers/00/000901.html
c. M.K. SAITO, *Yardsticks for «Trade and Environment»: Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures*, Jean Monnet Working Paper 14/01, available at http://www.jeanmonnetprogram.org/papers/01/013701.html

6.4. EU Countermeasures Against the Byrd Amendment

The Byrd Amendment, known as the Continued Dumping and Subsidy Offset Act of October 28, 2000, enabled the US government to pay the proceeds of anti-dumping and anti-subsidy duties to the American steel manufacturing companies that had brought antidumping complaints. These companies were entitled to payments to offset the expenses incurred after the imposition of anti-dumping measures. This meant that US companies that brought antidumping cases to the US authorities stood to benefit not only from the imposition of anti-dumping and countervailing duties on competing imports, but also from direct payments to them from the US government when those duties were disbursed.

In December 2000, eleven WTO Members (Australia, Brazil, Canada, Chile, the EU, India, Indonesia, Japan, Korea, Mexico and Thailand) requested the establishment of a panel to determine the incompatibility of the Byrd Amendment with the WTO.

The panel (in September 2002) and the Appellate Body (AB) (in January 2003) both ruled that the Amendment was illegal under WTO rules, and they recommended that the United States repeal the Amendment in order to comply with its WTO obligations.

Despite calls by the US administration to repeal the law, in December 2003 the US Congress had still not implemented the WTO ruling.

How could the WTO enforce the panel's recommendation?

WTO rules require that, in the event of non-compliance by a member following dispute settlement procedures, complainants seeking to preserve their retaliatory rights must seek retaliation authorization from the Dispute Settlement Body (DSB).

The failure to bring the measure into conformity with WTO rules prompted eight Members (Brazil, Canada, Chile, the EU, India, Korea, Japan and Mexico) to request authorization from the WTO to impose additional import duties on US products or to suspend other obligations to the US. The authorized level of retaliation is based on the trade effects of the most recent payments distributed from the anti-dumping or countervailing duties collected on the products originating from each member.

In August, 2004, the WTO Arbitrator ruled that the complaining parties could retaliate against the US for up to 72% of the annual level of US anti-dumping and countervailing duties collected on their respective exports and disbursed under the Byrd Amendment.

This level was based on an economic model developed by the WTO Arbitrator to measure the amendment's trade effect on US trading partners. This model identifies a coefficient which, when multiplied by the amount of disbursements over a given period, calculates the trade effect which could reasonably be deemed to correspond to the level of nullification or impairment for that period.

The rule established by the WTO Arbitrator to identify the economic coefficient equates the level of suspension of concessions or other obligations with the level of nullification or impairment sufferered by related industries or sectors.

In August 2005, Japan imposed $51 million in retaliatory tariffs against US exports.

What goals do WTO countermeasures rules achieve? WTO retaliatory and countermeasures do not aim at punishing violators. Instead, as the Byrd Amendment case demonstrates, the power to impose countermeasures achieves its goal of compliance through the market instrument of compensation. The WTO Agreement uses market rules to shape member behaviour, and the market is the only mechanism to check the breach of WTO law.

Main case:

- European Union (http://www.europa.eu.int)
  Council Regulation (EC) no. 673/2005, of 25 April 2005, *Establishing Additional Custom Duties on Imports of Certain Products Originating in The United States of America*, OJ L 110, 30 April 2005, p. 1 ff., also available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_110/l_11020050430en00010005.pdf

Sources:

a. Arbitration, United States – Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by the European Communities), Recourse to Arbitration by the United States under Article 22.6 of the DSU, n. WT/DS217/ARB/EEC, August 31st, 2004, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm
b. WTO Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 («Byrd amendment»), WT/DS217, 234/AB/R adopted on January 27th, 2003. United States, Appellant; Australia, Brazil, Canada, Chile, European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand, Appellees; Argentina, Costa Rica, Hong Kong (China), Israel and Norway, Third Participants. Division: Sacerdoti, Baptista, Lockhart, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/234ABR.doc
c. Award of the Arbitrator, United States – Continued Dumping and Subsidy Offset Act of 2000, Arbitration under Article 21.3(c) of the Dsu, WT/DS217/14, DS234/22, ARB-2003-1/16, June 13th, 2003, available at

http://docsonline.wto.org/DDFDocuments/t/WT/DS/234-22.doc

d. Panel Report, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/217/R, WT/DS234/R, September 16th, 2002, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm
e. Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), available at http://www.wto.org/english/docs_e/legal_e/19-adp.doc
f. Agreement on Subsidies and Countervailing measures, available at http://www.wto.org/english/docs_e/legal_e/24-scm.doc
g. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.doc

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q. R. BHALA and D.A. GANTZ, *Antidumping, Countervailing Duties and the Byrd Amendment. WTO Case Review 2003*, in *Arizona Journal of International & Comparative Law*, 21, 2004, no. 2, pp. 332 ff.
r. M.L. MOVSESIAN, *Actions against Dumping and Subsidization – Antidumping and SCM Agreements – United States Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment) – Interest Group Legislation*, in *International Decision*, *The American Journal of International Law*, 98, 2004, no. 1, pp. 150 ff.
s. D. BARCLAY and J. CANNON, *Remedies Against Remedies: the Byrd Amendment and the WTO*, available at http://www.williamsmullen.com/news/articles_detail/136.html
t. J. J. GRIMMET and V.C. JONES, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment)*, Congressional Research Service, 19 September 2005, available at http://www.dfait-maeci.gc.ca/tna-nac/documents/RL33045.pdf
u. K. ANDERSON, *Peculiarities of Retaliation in WTO Dispute Settlement*, in *World Trade Review*, 1, 2002, no. 2, pp. 123 ff.
v. J. PAUWELYN, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, in *The American Journal of International Law*, 94, 2000, no. 2, pp., 335 ff.

7. CONFLICTING JURISDICTIONS

7.1. Relations between Global Administrative Law and EU Law

The relationships between global administrative law and European Union law can have heterogeneous patterns.

One type of relationship is rooted in the relationship between general international law obligations (international rules and customs) and EU law. For example, in the *Ahlström* case, the European Court of Justice recognized that general international rules can constitute a benchmark for the legitimacy of EU acts. In particular, the Court declared that a decision of the Erropean Commission on competition is compatible with Article 81 of the EC Treaty, as well as with the rules of general international law invoked by the parties (point n. 23 of the judgment). In another case, *A. Racke GmbH & Co.*, the European Court ruled that the Community must respect the «[…] rules of customary international law, when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country». And that «[…] the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order» (points n. 45-46).

A second type of relationship exists between the rules based on international agreements undertaken by the European Community and EU law. In some cases, the European Court recognizes that these international rules – which become part of the Community legal order (Article 300.7 EC Treaty) – produce direct effects in the European system, under the same conditions required for EU rules to produce direct effects within Member States (*Bresciani* case, point n. 18). Moreover, the obligations of an international agreement, concluded by the Community and not founded on the principle of mutual convenience, are a legitimacy benchmark for acts adopted by the European institutions, regardless of whether such agreements produce direct effects (*Kingdom of the Netherlands v. European Parliament and EU Council* case, points n. 53-54).

Another interesting type of relationship is the one between the rules of international organizations, based on agreements signed by their Member States (as in the case of the United Nations Charter and the GATT, before the signature of the Treaty of Rome) and EU law. The *Leon Van Parys* case raises the question as to whether GATT-WTO rules are binding upon EU institutions, and whether private parties are entitled to seek the judicial enforcement of these rules (i.e. do the GATT-WTO rules have direct effect?). The European Court, considering the judicial precedents, declared that the GATT-WTO rules were not to be viewed as a legitimacy benchmark for EU acts (except in specific cases). Secondly, the Court stated that a private individual could not seek relief in a Member State national court for harms arising out of Community legislation that was incompatible with GATT-WTO rules, even where the Dispute Settlement Body (DSB) had declared the legislation to be incompatible with those rules (issue of the direct effect of DSB decisions, point n. 54).

Conversely, the *Kadi* case (above examined in reference to International Terrorism and Due Process: para. 4.3) deals with the relationship between United Nations rules and EU law. In particular, the Court recognized that the obligations of Member States (following from the UN Charter) shall prevail over any other obligations, such as those based on the European Convention on Human Rights and the EC Treaty. Moreover, the Court stated that, though the Community is not itself a Member of the United Nations, it is nonetheless bound by the obligations set forth in its Charter, just as individual Member States are. Finally, the Court affirmed that the European

Court cannot assess the legitimacy of a UN Security Council resolution, which is arguably incompatible with EU law and fundamental rights. Quite to the contrary, it can assess the legitimacy of a EU regulation – and indirectly of a Security Council resolution, as integrated in a EU regulation – only when it proves to be incompatible with the international rules of *jus cogens*, pertaining to the universal protection of fundamental human rights (points n. 231-277).

The following are some problems raised by the above-mentioned cases. Is it possible to establish a hierarchy between global rules and EU rules? What differences are there between the relationship between EU law and general international law, on the one hand, and between EU law and the conventional international law, on the other? What are the sources of, and the reasons for, the differences between the relationship of the EU law with the global rules set forth by agreements signed by Member States, and the global rules established in agreements concluded by the Community? What is the principle of mutual convenience? What are its effects? Is there a parallelism between the EU law-national law relationship, on the one hand, and the global law-EU law relationship, on the other? What are the relationships between the EU legal system, and the UN and WTO systems? Why do UN rules trump EU laws, while the contrary applies to WTO rules? What are the effects of the UN rules' prevalence on the legal systems of both the EU and the Member States? How do global rules influence the European Court's jurisdiction? What differences exist between the fundamental rights protected by the Community legal order, and the imperative rules of *jus cogens*?

Main cases:

- European Court of Justice (http://www.curia.eu.int)
  A. Ahlström Osakeyhtiö and others v. Commission of the European Communities, 27 September 1988, joined cases 89, 104,114, 116-117, 125-129/85, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0089(01):EN:HTML
  A. Racke GmbH & Co. v. Hauptzollamt, 16 June 1998, C- 162/96, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996J0162:EN:HTML
  Conceria Daniele Bresciani v. Amministrazione delle finanze dello Stato, 5 February 1976, 87/75, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61975J0087:EN:HTML
  Kingdom of Netherlands v. European Parliament and Council of the European Union, 9 October 2001, C-377/98, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0377:EN:HTML
  Léon Van Parys NV v. Belgisch Interventie-en Restitutiebureau (BIRB), 1 March 2005, C-377/02, available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:C:2005:106:0004:0004:EN:PDF
  Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, 21 September 2005, case T-315/01, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTML

Sources:

Ahlström case

a. Commission Decision (EEC) no. 85/202 (IV/29.725), 19 December 1984, OJ L 85, of

26 March 1985, pp. 1 ff., also available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31985D0202&model=guichett

b. Free Trade Agreement between EEC and Finland

c. Art. 81, n. 1, EC Treaty, Rome, 25 March 1957, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

Racke case

d. Council Regulation (EEC) no. 3300/91, of 11 November 1991, *Suspending the Trade Concessions Provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia*, OJ L 315, of 15 November 1991, pp. 1. ff., also available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31991R3300&model=guichett

e. EEC/Yugoslavia Cooperation Agreement, Belgrade, 2 April 1980, approved on behalf of the Community by Council Regulation (EEC) no. 314/83 of 24 January 1983, OJ L 41, of 14 February 1983, pp. 1 ff.

f. Art. 177, EC Treaty, Rome, 25 March 1957, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

Bresciani case

g. Convention of Association between the European Community and the African States and Madagascar associated with that Community, signed at Yaounde on 20 July 1963 and concluded in the name of the Community by the Council in its decision of 5 November 1963, OJ 93, of 11 June 1964, pp. 1430 ff.

h. Convention of Association signed at Yaounde on 29 July and concluded in the name of the Community by the Council in its decision of 29 September 1970, OJ L 282, of 28 December 1970, pp. 1 ff.

i. Art. 23 and 25, EC Treaty, Rome, 25 March 1957, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

Kingdom of Netherlands case

j. Directive (EC) no. 98/44, of the European Parliament and of the Council, of 6 July 1998, *On the Legal Protection of Biotechnological Inventions*, OJ L 213, of 30 July 1998, pp. 13 ff., available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998L0044&model=guichett

k. Art. 95, 308 157, 163, EC Treaty, Rome, 25 March 1957, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

Léon Van Parys case

l. Opinion of Advocate General A. Tizzano, 18 November 2004, available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-377/02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

m. Report of the Appellate Body, of 9 September 1997, (WT/DS27/AB/R), available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/27ABR.wpf

n. Panel Reports of, 25 September 1997, (WT/DS27/R/ECU,WT/DS27/GTM-WT/DS27/R/HND,WT/DS27/R/MEX,WT/ DS27/R/USA), available at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%40meta%5FSymbol+%28WT%FCDS16%FC%2A+or+WT%FCDS27%FC%2A+or+WT%FCDS105%FC%2A+or+WT%FCDS152%FC%2A+or+WT%FCDS158%FC%2A+or+WT%FCDS165%FC%2A+or+WT%FCDS237%FC%2A%29+and+%28R%29+and+not+%28ARB%29+and+not+%28RW%29+and+not+%28AB%29+and+%28%28+%40Doc%5FDate+%3E%3D+1997%2F01%2F01+00%3A00%3A00+%29+and+%28+%40Doc%5FDate+%3C%3D+1997%2F12%2F31+23%3A59%3A59+%29%29&language=1

o. Last acts about «bananas dispute»: European Communities-the ACP-EC Partnership Agreement (WT/MIN(01)/15), 14 November 2001; European communities-the ACP-EC Partnership Agreement- second recourse to arbitration pursuant to the decision of 14 November 2001, Award of Arbitration (WT/L/625), 27 October 2005, available at http://www.wto.org

p. Council Regulation (EEC) no. 404/93, of 13 February 1993, *On «The Common Organisation of the Market in Bananas»*, OJ L 47, of 25 February 1993, pp. 1 ff., also available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993R0404&model=guichett

q. General Agreement on Tariffs and Trade (GATT), 30 October 1947, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

r. Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the Agreement Establishing the World Trade Organisation (WTO), 15 April 1994 http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding

s. Convention ACP-CEE, Lomè, 15 Dicember 1989

Kadi case (see also para. 4.3)

t. Council Regulation (EC) no. 467/01, of 6 March 2001, *Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, and Repealing Regulation (EC) no. 337/2000*, OJ L 67, of 9 March 2001, pp. 1 ff.; Commission Regulation (EC) no. 2062/2001, of 19 October 2001, *amending, for the third time, Regulation no. 467/2001*, OJ L 277, of 20 October 2001, pp. 25 ff.; Council Regulation (EC) no. 881/2002, of 27 May 2002, *Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and Repealing Regulation (EC) no. 467/2001*, OJ L 139, of 29 May 2002, pp. 9 ff.; Council Regulation (EC) no. 561/03, of 27 March 2003, *Regarding Exceptions to the Freezing of Funds and Economic Resources*, OJ L 82, of 29 March 2003, pp. 1 ff., also available at http://europa.eu.int/eur-lex/en/search/search_lif.html

u. UN Security Council's resolutions 1267 (1999), of 15 October 1999; 1333 (2000), of 19 December 2000; 1390 (2002), of 16 January 2002; 1452 (2002), of 20 December 2002; 1455 (2003), of January 2003, available at http://www.un.org/documents/scres.htm

v. Charter of the United Nations, San Francisco, 26 June 1945, available at http://www.un.org/aboutun/charter/

w. European Convention for Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, available at http://www.hri.org/docs/ECHR50.html

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a. A. ALEMANNO, *La jurisprudence de la Cour de justice et du Tribunal de première instance - Droit de l'OMC (arrêt «Van Parys»)*, in *Revue du droit de l'Union européenne*, 15, 2005, no. 1, pp. 189 ff.
b. K. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, New York, Oxford University Press, 2001
c. J. BOURGEOIS, *The European Court of Justice and the WTO: Problems and Challenges*, in *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade*, edited by J.H.H. Weiler, Oxford, Oxford University Press, 2003
d. S. CASSESE, *Legal Imperialism and «Raison d'Etat» in the Global Administrative Law*, paper presented at the NYU Law School Conference on «Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance», 22-23 April 2005, pp. 5 ff.
e. M. CREMONA, *Neutrality or Discrimination? The WTO, the EU and External Trade*, in *The European Union and WTO. Legal and Constitutional Issues*, edited by G. de Burca and J. Scott, Oxford, Oxford University Press, 2003
f. G. DELLA CANANEA, *The EU and the WTO: a «Relational» Analysis*, paper presented at the Vienna Conference on «New Foundations for European and Global Governance», 29-30 November 2004
g. P. EECKHOUT, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004
h. S. GRILLER, *Enforcement and Implementation of WTO Law in the European Union*, in *The Banana Dispute. An Economic and Legal Analysis*, edited by S. Griller et al., Wien-New York, 2003
i. M. MENDEZ, *The Impact of WTO Rulings in the Community Legal Order*, in *European Law Review*, 29, 2004, no. 4, pp. 517 ff.
j. A. STONE SWEET, *Constructing a Supranational Governance. Dispute Resolution and Governance in the European Community*, 92, in *American Political Science Review*, 1998, pp. 92 ff.
k. J.H.H. WEILER, *The Rule of Lawyers and Ethos of Diplomants: Reflection on the Internal and External Legitimacy of WTO Dispute Settlement*, New York University School of Law, Jean Monnet Working Paper 9/00, available at http://www.jeanmonnetprogram.org/papers/00/000901.html

7.2. The *Conseil d'Ètat* and Schengen

The Schengen Agreement allows people who are legally present in the European countries that are party to the Agreement to move around freely without having to show passports when crossing internal borders.

This freedom of movement is accompanied by so-called «compensatory» measures. These measures involve improving co-ordination between the police, customs and the judiciary in the Schengen-area States and taking necessary measures to combat important problems such as terrorism and organised crime. In order to make this possible, a complex information system known as the Schengen Information System (SIS) was set up to exchange data on people's

identities and descriptions of lost or stolen objects.

When an individual's details have been entered into the SIS on the basis of a national assessment of security risk, a tension arises when the individual applies for entry (or a visa) to another member State.

Specifically, the SIS has a blacklist that allows the participating countries to keep a record of persons they do not wish to see entering the Schengen area. This list has great consequences for the individual. A person on the blacklist may have committed a serious crime, for instance, or may have been expelled or deported and ordered not to re-enter a country for a specific period of time.

In June 1999, the French *Conseil d'Etat* handed down two significant judgments.

In the first case, *Madam Hamssaoui,* the visa applicant was a Moroccan national. She sought a French visitor's visa to visit her daughter, who was married to a French national, and their child. She was refused the visa because her name had been entered into the SIS. No further grounds were given.

The Court contemporaneously handed down a decision in the case of *Madame Forabosco*, a Romanian national who had married a French national and sought a French family reunification visa. Her visa was refused, because her details had been entered into the SIS. Again, the *Conseil d'Etat* held that she was entitled to sufficient information regarding her entry into the system, in order to enable the national court to determine the lawfulness of her entry.

In both cases, the SIS entry had been made by Germany, after individual asylum applications had been rejected. As the German authorities had not received notification that the applicants had left the territory, their names had been inserted in the SIS as persons who had unlawfully remained in Germany.

As demonstrated by the *Conseil d'Etat* decisions, one national tribunal in the Schengen area can determine the legality of an administrative act issued by another member of the Schengen System.

In the absence of a supranational executive, these decisions substantially alter the fundamental nature of the Schengen System. The pure basis in mutual recognition has been challenged by the national court of one Member State.

Can a national court function like a supra-national administrative court?

Main cases:

- Conseil d'Etat, Section, 9 Juin 1999, M. et M.me Forabosco, available at http://www.rajf.org/article.php3?id_article=215-17k
- Conseil d'Etat, Section, 9 juin 1999, M.me Hamssaoui, available at http://www.rajf.org/article.php3?id_article=216-13k-

Sources:

a. Schengen Treaty, available at http://www.unhcr.bg/euro_docs/en/_schengen_en.pdf

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b. M. GAUTIER, *Le dépassement du caractère national de la juridiction administrative française: le contentieux Schengen*, in *Droit Administratif*, 2005, no. 5, pp. 7 ff.
c. C. SAAS, *Les refus de délivrance de visas fondés sur une inscription au Système Information Schengen*, in *Culture & Conflits*, 50, 2003, no. 2, available at

http://www.conflits.org/document917.html

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e. D. THYM, *The Schengen Law: a Challenge for Legal Accountability in the European Union*, in *European Law Journal*, 8, 2002, no. 2, pp. 218 ff.

7.3. Jurisdiction over Cyberspace: Sovereignty and Jurisdiction

On May 22, 2000 Licra, joined by defendant *L'Union Des Etudiants Juifs De France*, a non-profit organization dedicated to fighting anti-Semitism, commenced an action against Yahoo! in a French court. The French court found that approximately one thousand Nazi and Third Reich-related materials were offered for sale on Yahoo.com's auction site. Because French citizens could access these auctions via links from Yahoo.fr, the French court concluded that Yahoo.com's auction site violated section R645-1 of the French Criminal Code, which prohibits the exhibition of Nazi propaganda and artifacts for sale. As a result, the French court issued an order in which the court ordered «the Company Yahoo! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes».

This order was reaffirmed by the French court on November 20, 2000, despite Yahoo!'s contentions that compliance with the French order was technologically impossible. The French court directed Yahoo! to comply with its order within three months, or face a penalty of 100,000 francs per day.

Yahoo! subsequently posted the required warning, and prohibited postings in violation of Section R645-1 of the French Criminal Code on its Yahoo.fr site. Yahoo! also amended its auction policy to prohibit auctions of items that «promote, glorify or [are] directly associated with Nazis». Notwithstanding this change in policy, there were still items for sale on Yahoo!'s auction site which violated the French order. In addition, Yahoo! did not prevent access from its site's search engine/directory to other sites which «may be construed as constituting an apology for Nazism or a contesting of Nazi crimes».

Yahoo! thereafter commenced an action in the United States District Court for the Northern District of California, seeking a declaratory judgment that the French order could not be enforced in the United States.

After deciding that this question must be answered by the application of US law, the court held that the enforcement of the French order would run afoul of the First Amendment of the US Constitution. The French order, prohibiting the sale of Nazi related items, is a content-based restriction that «a United States court constitutionally could not make». As recognized by the Court, «the First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence», and such compelling interest was not present in this case.

The French order also ran afoul of the First Amendment because it was impermissibly vague, insofar as it directed Yahoo! to «take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes».

The Court found that there was a substantial controversy between parties having adverse legal interests of sufficient immediacy to warrant the issuance of a declaratory judgment. Yahoo! was

faced with a valid order from a French court, which prohibited it from engaging in certain conduct on pain of financial penalty. The uncertainty Yahoo! faced, as to whether the remedial actions it had undertaken were sufficient to meet the mandates of the French order, «is the precise harm against which the Declaratory Judgment Act is designed to protect».

The Court rejected the defendants' contention that application of the abstention doctrine mandated that the court refrain from resolving the issues before it. While abstention is an appropriate remedy against international forum shopping, such was not the case here. The issue before the US court - the enforceability of the French order in the United States – was most appropriately determined by a United States court itself. Importantly, it was not the same issue that the French court faced - whether Yahoo!'s conduct ran afoul of French law – and which Yahoo! was not seeking to relitigate. The Court accordingly declined to abstain from rendering a determination on the action.

Lastly, the Court determined that it was not obliged, under principles of comity, to enforce the French order, given its conflict with the important US policy considerations reflected in the First Amendment.

The Court accordingly declared the French order unenforceable in the United States.

The Yahoo! case highlights the legal potential of cyberspace involvements. In the global framework, where the owner of website might breach a foreign law, what is the role of a national tribunals? How ought jurisdiction to be allocated in such cases?

Main case:

- Tribunal de Grande Instance de Paris, Ordonnance de référé du 22 mai 2000, available at http://www.foruminternet.org/documents/jurisprudence/lire.phtml?id=129-35k
- United States Court of Appeals for the Ninth Circuit, *Yahoo!Inc., a Delaware Corporation, Plaintiff-Appellee, v. La Ligue contre le Racisme et l'Antisemitisme, a French Association*; *l'Union des etudiants juifs de France, a French Association, Defendants-Appellants*, Appeal n. 01-17424, available at http://www.bslaw.net/licra/

Sources:

a. Loi du 29 juillet 1881, 29/07/1881, sur la liberté de la presse, available at http://www.foruminternet.org/documents/lois/lire.phtml?id=6-103k
b. Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 1968, available at http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html
c. The First Amendment of the United States Constitution, available at http://www.law.cornell.edu/constitution/constitution.billofrights.html

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d. H.H. PERRITT JR, *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strenghtening National and Global Governance*, in *Indiana Journal of Global Legal Studies*, 5, 1998, pp. 423 ff.
e. J. P. TRACHTMAN, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, in *Indiana Journal of Global Legal Studies*, 5, 1998, pp. 561 ff.

f. D. MENTHE, *Jurisdiction in Cyberspace: a Theory of International Spaces*, in *Michigan Telecommunications Technology Law Review*, 4, 1998, pp. 69 ff., also available at http://www.mttlr.org/volfour/menthe.pdf
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7.4. The Internationalization of Antitrust Policy

The internationalization of antitrust policy, which is connected to economic denationalization, seems to follow three main paths.

The first concerns multilateral internationalization and is centred on the International Competition Network (ICN), the international network representing the National Competition Authorities (NCA). The significance of the ICN's contribution can be fully appreciated by looking at a passage from the 2005 Italian NCA Annual Report. This states that, although the ICN's recommendations are not compulsory, they cannot be considered a mere theoretical exercise, as they constitute an important reference for NCAs. This is particulary relevant in relation to notification procedures and the examination of mergers. The NCAs are the main actors in this process, as they directly represent national States' interests.

Even in the World Trade Organization (WTO), work is under way to examine the effects of antitrust measures on world trade (The Doha Agenda – «Interaction between trade and competition policy»). The study focuses on the «preparation for negotiations» phase. Again, the scope is to establish an international multilateral framework to deal with antitrust issues. In this case, national States are the main actors.

The second path refers to bilateral internationalization. This is based on several Treaties on «Positive Comity» (1995-98), which promote cooperation between US and EU antitrust authorities. These agreements have been applied by the Commission only in the case of *Crs Sabre v. Amadeus*. In this proceeding, Crs, a European company, was obliged to abide by a policy of non-discrimination towards its American competitor. The limit of this type of collaboration is twofold: firstly, it does not address mergers; secondly, no antitrust authority enjoys an exclusive control over proceedings, as the other one retains its own power to initiate a new one. In this case, the second procedure will prevail over the former one. In Europe, the Commission is the main player in this process, while national States play a marginal role.

The third path is centred upon the effects of some European antitrust measures, which have effects beyond their jurisdiction. One of the most relevant cases arises out of the European Commission's refusal to authorise the merger between General Electric and Honeywell (both are American aeronautical firms). The decision was recently upheld by the European Court of First Instance. This last path is emblematic of the remarkable differences in antitrust policy between macro-areas like Europe and the US, which have similar patterns of economic and cultural growth. The nature of the obstacles to the globalisation of antitrust policy is clearly demonstrated.

It is not difficult to comprehend the underlying principles that govern the internationalization of antitrust policy. However, it is less clear why its development is not unitary, and why the ICN's activity now represents the most advanced form of this process. There is an evident paradox. On

the one hand, agreements between States fail (see the unsuccessful venture of positive comity and WTO negotiations); on the other hand, global standard-setting between NCAs seems to be more successful (although there is a lack of the traditional systems to ensure accountability). In fact, the ICN is a private association which brings together public bodies; it adopts rules that enter into force once they are applied by national authorities. States, which are the main actors on the international scene, do not favor the globalization of antitrust policy. They prefer mantaining political control of global competition, rather than submitting it to the rule of law. On the contrary, the NCAs promote the rule of law in global competition. In this way, even though they belong to national States, they support a different interest.

Globalization can generate a clash between public bodies' and citizens' interests. For instance, in the case of air transportation, citizens' primary interest is to assure competitive prices for services; public bodies, on the contrary, seek to promote national companies' mergers, in order to reduce the «negative» effects of global competition.

If the governments' position prevails, a higher degree of conflict in resolving global antitrust issues is to be expected. At the moment, we are witnessing several cases of European antitrust measures that have effects beyond Europe. This plainly shows how the protectionist policies of States are stronger than the internationalization of antitrust policy.

Main cases:

Divergent Enforcement Policies

- Judgment of the Court of First Instance, of 14 December 2005, *Honeywell International, Inc. v Commission of the European Communities*, case T-209/01, available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:C:2006:048:0026:0026:EN:PDF

Multilateral approach

- International Competition Network, Memorandum on the Establishment and Operation, available at http://www.internationalcompetitionnetwork.org/mou.pdf
- World Trade Organization: The Doha Ministerial declaration: «Interaction between trade and competition policy», available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction

Bilateral approach

- Agreement between the European Communities and Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_173/l_17319980618en00280031.pdf

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b. Case no. COMP/M. 2220 – General Electric/Honeywell, 3 July 2001, available at http://www.EUropa.EU.int/comm/competition/mergers/cases/decisions/m2220_en.pdf
c. Department of Justice – Justice Department requires divestitures in merger between General Electric and Honeywell, 2 May 2001

d. Regulation (EEC) no. 4064/89, *On the Control of Concentrations Between Undertakings*, OJ L 257, of 21 September 1990, pp. 13 ff.
e. Decision of the Council and Commission, of 29 May 1998, *Concerning the Conclusion of the Agreement Between the European Communities and Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws*, OJ L 173, of 18 June 1998, pp. 26 ff.
f. Memorandum on the Establishment and Operation of the International Competition Network (ICN), available at http://www.internationalcompetitionnetwork.org/aboutus.html
g. Agcm, Annual Report 2005 concerning the rule-making of ICN, available at http://www.agcm.it
h. Working Groups of ICN (http://www.internationalcompetitionnetwork.org/workinggroups.html)
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   i1. Report on Fourth Annual Conference of ICN
   i2. Mergers Working Group – MWG: Remedies
   i3. MWG: Waivers of Confidentiality in Merger Investigations
   i4. MWG: Merger Notification Filing Fees
   i5. MWG: Implementation of the ICN Recommended Practices for merger notification and review procedures
   i6. MWG: Project on merger guidelines: merger guidelines workbook
   i7. MWG: Merger Remedies Review Project
   i8. MWG: ICN Investigative Techniques Handbook for Merger Review
j. Negotiations, implementation and development: the Doha agenda, available at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm
   j1. Interaction between trade and competition policy
   j2. Trade and competition policy: Working group set up by Singapore ministerial
   j3. Working Group on the Interaction between Trade and Competition Policy: Revised tables summarizing contributions to the working group on elements included in paragraph 25 of the Doha ministerial declaration, available at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm

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c. C.A. JAMES, *Reconciling Divergent Enforcement Policies: Where Do We Go From Here?*, in *Fordham Corporate Law Institute*, 25 October 2001
d. M. ELLIOTT, *The Anatomy of the GE-Honeywell Disaster*, July 8, 2001, available at http://www.time.com/time/business/article/0,8599,166732-1,00.html
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l. *International Antitrust Law & Policy. Annual Proceedings of the Fordham Corporate Law Institute*, Juris Publishing, 2002
m. *Competition Laws Outside the United States*, edited by H. S. Harris Jr. et al., Section of Antitrust Law, American Bar Association, 2001
n. K. EWING JR., *Competition Rules for the 21st Century*, in *International Competition Law Series*, Kluwer Law International, Vol. 10, 2003
o. J. BASEDOW, *Limits and Control of Competition with a View to International Harmonization*, in *International Competition Law Series*, Kluwer Law International, Vol. 7, 2002
p. C. JONES and M. MATSUSHITA, *Competition Policy in the Global Trading System*, in *International Competition Law Series*, Kluwer Law International, Vol. 5, 2002
q. Y.-C. CHAO, G. SAN, C. LO and J. HO, *International and Comparative Competition Laws and Policies,* in *International Competition Law Series*, Kluwer Law International, Vol. 3, 2001
r. M.W. GEHRING, *Sustainable Competition Law*, Fifth Session of the Ministerial Conference of the World Trade Organization, 10-13 September 2003, available at http://www.cisdl.org/pdf/Cancun_WTO_LegalBrief2.pdf

8. GLOBAL SECURITY

8.1. The EU and the Intervention in Bosnia and Herzegovina

The United Nations Charter establishes the absolute functional pre-eminence of the United Nations over any regional organization operating in the field of the maintenance of international peace and security. The primacy of UN regulation over international treaty law is established by Article 103 of the Charter, which provides that «[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail». With reference to «regional arrangements or agencies» operating in the field of maintenance of international peace and security, their power to undertake enforcement measures is subject to the confirmation that the regional organization's charter and activities are consistent with the purposes and principles of the United Nations. Such compliance should not be merely formal. Thus, the Charter's assertion of UN supremacy in the field of peace and international security is coupled with the requirement of the substantial consistency of the actions taken by the regional agency with UN goals.

The functional supremacy of the United Nations is clearly recognized in both the Maastricht Treaty and in the documents adopted by EU institutions. The former provides that the goal of preserving peace and strengthening international security should be pursued «in accordance with the principles of the United Nations Charter». Furthermore, EU institutions have reiterated and specified such commitment on several occasions. For instance, the conclusions drawn by the Swedish Presidency of the Göteborg Council, held on 15 June 2001, confirmed the need for a close cooperation with the United Nations. In *A Secure Europe in a Better World*, EU High Representative Solana identified the UN Charter as the «fundamental framework» in which international relations should be placed and an «effective multilateral system» should be developed. Moreover, the communication of the Commission on the relationship between the EU and the United Nations reiterated the commitment of the Union and its Member States to contribute to fulfilling UN goals for conflict prevention and crisis management.

In the following case, the European Council sent a EU military mission to Bosnia and Herzegovina, in order to monitor the implementation of certain aspects of the General Framework Agrreement for Peace in the region, as well as to support the process of EU integration. The UN Security Council welcomed the EU's intention to launch the mission.

This development raises several questions. What relationships are established between the EU, its Member States and the UN? Do such organizations operate as separate bodies, both at the political and administrative level? Or do they tend to be interconnected, if not in a genuinely unitary whole, at least in a relatively stable network of public power? If this is the case, what are the distinguishing features of such polycentric but interconnected organization? Finally, is the EU exercising a specifically European function or is it contributing to the exercise of a function which is instead anchored in the global legal order?

Main case:

- Resolution 1551 (2004) adopted by the Security Council at its 5001st meeting, on 9 July 2004, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1561%20(2004)&Lang=E&Area=UNDOC
- Council Joint Action 2004/570/CFSP, of 12 July 2004, *On the European Union Military*

Operation in Bosnia and Herzegovina, in OJ L 252, of 28 July 2004, pp. 10 ff., also available at http://www.europa.eu.int/eur-lex/lex/Notice.do?val=387134:cs&lang=it&list=387134:cs,343154:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu=#texte

Sources:

a. Charter of the United Nations, art. 39-54, available at http://www.un.org/aboutun/charter/index.html
b. European Union Treaty, art. 11-28, available at http://www.europa.eu.int/eur-lex/lex/it/treaties/dat/12002M/htm/C_2002325IT.000501.html
c. *A Secure Europe in a Better World*, Javier Solana, EU High Representative for the Common Foreign and Security Policy, European Council, Thessaloniki, 20 June 2003, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76255.pdf
d. Communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The Choice of Multilateralism*, COM (2003) 526, available at http://www.europa.eu.int/eur-lex/lex/Notice.do?val=278739:cs&lang=en&list=278739:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte

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e. A. MISSIROLI, *The European Union: Just a Regional Peacekeeper?*, in *European Foreign Affairs Review*, 8, 2003, no. 4, pp. 493 ff.
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8.2. The Security Council and the Global War

Through an increasingly broad interpretation of situations comprehending a «threat to the peace», «breach of the peace», or «act of aggression», the United Nations has gradually developed a function aimed at guaranteeing the military security of the international community.

This is a broad objective, which includes not only the suspention of hostilities between fighting parties, but also the pursuit of further goals, like the restoration of international legality and the protection of fundamental rights.

The progressive definition of this function does not imply the abolition of the specific defence and security functions of the States. However, far from being irrelevant to the latter, it influences and even determines their substantive policies. Indeed, as States belong to several regional organizations, as well as to the universal organization, national security policy can only be developed within the limits allowed by global law. Global law limits the scope of national defence and security activity, while guiding such activity by the higher exigencies of the global legal order.

This perspective, however, raises several problems. Rather than there being a linear process,

whereby the national polices must adjust to supranational ones, there are centrifugal forces, stemming from States' unilateral actions. Given its superpower status, the most relevant example is the United States. Between December 1999 and September 2002, the US administration put forward a doctrine of prevention, whereby the US claims the rights to exercise defensive military action aimed at anticipating actual acts of aggression. Such a doctrine can be considered compatible with Article 51 of the UN Charter only by interpreting it in a remarkably broad way.

The following case exemplifies the problems deriving from the interaction between national and global functions. After the military invasion of Iraq by the US and its allies, the Security Council has deliberated on the use of force in the occupation phase. The various Resolutions adopted by the Security Council demonstrate the tension between the role of the United Nations and the conduct of a coalition of States, as well as the complexity of the armed intervention, which was not just a coercive reaction to an illegal national action, but also a peace-keeping and nation-building operation. Are the occupying forces' positions a mere opposition to the United Nations, in so far as they imply at least a partial equalization of international law with US national public law? Or does this represent a more complex development, at least partly complementary to the UN functional design, to the extent that security is defined on a global scale and in close connection with the protection of human rights? If so, to what extent is the global function subject to global and to domestic law? And what is the result of the interaction between these two forces?

Main case:

- Resolution 1483 (2003) adopted by the Security Council at its 4761st meeting, on 22 May 2003, available at http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1483%20(2003)&Lang=E&Area=UNDOC
- Resolution 1500 (2003) adopted by the Security Council at its 4808th meeting, on 14 August 2003, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1500%20(2003)&Lang=E&Area=UNDOC
- Resolution 1511 (2003) adopted by the Security Council at its 4844th meeting, on 16 October 2003, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1511%20(2003)&Lang=E&Area=UNDOC
- Resolution 1546 (2004) adopted by the Security Council at its 4987th meeting, on 8 June 2004, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1546%20(2004)&Lang=E&Area=UNDOC
- Resolution 1557 (2004) adopted by the Security Council at its 5020th meeting, on 12 August 2004, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1557%20(2004)&Lang=E&Area=UNDOC
- Resolution 1618 (2005) adopted by the Security Council at its 5246th meeting, on 4 August 2005, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1618%20(2005)&Lang=E&Area=UNDOC

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9. THE IMPACT OF AMERICAN LAW

9.1. Anticompetitive Conduct, Foreign Injury and the Judgment of the Supreme Court: the Long Arm of American Law

Can a non-American company, which alleges an injury caused by a cartel in foreign markets (in Ecuador, Ukraine, Panama and Australia), seek damages for the anticompetitive conduct of an American company in American courts? Can the United States, by virtue of national legislation, assert its jurisdiction over antitrust cases involving global markets, irrespective of the traditional criteria of jurisdiction in international cases, i.e. the parties' place of residence and the place where the injury occurred (the effects doctrine)?

The issue of jurisdiction is controversial and its resolution has many implications, from class actions to discovery. But when the US Supreme Court ruled on this matter, it gave a rather ambiguous answer.

It must be stated from the outset that the Sherman Act is not applicable to conduct involving trade with foreign countries. However, this rule does not apply when the conduct has an adverse effect on imports, domestic trade or US exporters. This exception is known as the Foreign Trade Antitrust Improvements Act (FTAIA), which was enacted by Congress in 1982.

As a result, injured companies can request the application of US antitrust law when higher prices abroad are strictly connected with increased prices on the US market. The crux of the matter is the relationship between «foreign effect» and «domestic effect». The Supreme Court ostensibly reversed the Court of Appeals' decision and denied expansion of the FTAIA's scope of application; i.e., it held that a foreign plaintiff couldn't invoke a violation of the Sherman Act when the foreign injury was independent of domestic effects. But this decision turned out to pave the way for the «universality» of US jurisdiction. In fact, since foreign injury on global markets is closely connected with the domestic effects of price increases (otherwise goods would be directly purchased on the US market itself), it is inferred that foreign companies suffering from injury caused by anticompetitive conduct outside the US trade area can seek legal damages in the US.

Main case:

- Supreme Court of the United States (http://www.supremecourtus.gov)
  Hoffmann-LaRoche Ltd. et al. v. Empagran S.A. et al., June 14, 2004,
  available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=03-724)

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